In the

Supreme Court of the United States

OCTOBER TERM, 1964

No. 496

ESTELLE T. GRISWOLD
AND
C. LEE BUXTON,
Appellants,
v.
CONNECTICUT.

Appeal From The Supreme Court Of Errors Of Connecticut

BRIEF FOR APPELLANTS

THOMAS I. EMERSON,
127 Wall Street,
New Haven, Connecticut

CATHERINE G. RORABACK,
185 Church Street,
New Haven, Connecticut
Attorneys for Appellants.

THE MACK CO., NORTH HAVEN, CONN.

SUBJECT INDEX

AUTHORITIES CITED

In the

Supreme Court of the United States

OCTOBER TERM, 1964

No. 496

ESTELLE T. GRISWOLD
AND
C. LEE BUXTON,
Appellants,
v.
CONNECTICUT.

Appeal From The Supreme Court Of Errors Of Connecticut

BRIEF FOR APPELLANTS

OPINION BELOW

The opinion of the Supreme Court of Errors of Connecticut is reported in 151 Conn. 544, 200 A.2d 479. It is reprinted in the record at pages 61-63.

[1] The authors of this brief wish to record their great and obvious debt to Professor Fowler V. Harper who worked on this matter up to the time of his death on January 8, 1965.

JURISDICTION

On November 19, 1961, appellants Estelle T. Griswold and C. Lee Buxton were arrested on informations filed by the Prosecuting Attorney for the Circuit Court of Connecticut, Sixth Circuit, alleging violations of Sections 53-32 and 54-196 of the General Statutes of Connecticut (R. 1, 7). Appellants filed demurrers on the grounds, *inter alia*, that said statutes were unconstitutional as being a denial of due process of law under the Fourteenth Amendment, and a denial of freedom of speech under the First and Fourteenth Amendments, of the Constitution of the United States (R. 2, 8). On December 20, 1961, the demurrers were overruled on both grounds (R. 3-6, 9-12).

Appellants were tried before the Circuit Court without a jury, found guilty and, on January 2, 1962, sentenced to pay fines of $100 each (R. 13-4). Appeals were taken from the judgments and, on order of the Circuit Court, the appeals were combined (R. 15). A statement of findings of fact, conclusions and rulings was made by the Circuit Court on June 12, 1962 (R. 16-30, 32-3).

Appellants filed an assignment of errors which, *inter alia*, again challenged the constitutionality of the Connecticut statutes on the grounds set forth above (R. 33-7). On January 7, 1963, the Appellate Division affirmed the convictions (R. 40-50).

The Appellate Division certified to the Supreme Court of Errors the two questions raised by the demurrers as to the constitutionality of the statutes (R. 49-50). The Supreme Court of Errors granted the petition of appellants to certify additional questions (R. 52-60). Thereafter, on April 28, 1964, the Supreme Court of Errors affirmed the judgment of the Appellate Division, holding that the Connecticut statutes under at-

tack were not in conflict with the United States Constitution (R. 61-5). Stay of execution was ordered on May 20, 1964 (not printed in record).

Notice of appeal to the Supreme Court of the United States was filed with the Supreme Court of Errors of Connecticut on July 22, 1964 (R. 65-6). On December 7, 1964, this Court noted probable jurisdiction (R. 67).

This Court has jurisdiction under 28 U.S.C. 1257 (2). *Dahnke-Walker Milling Co.* vs. *Bondurant*, 257 U.S. 282 (1921).

STATUTES INVOLVED

The statutes involved in this case are Sections 53-32 and 54-196, General Statutes of Connecticut, Revision of 1958.

Section 53-32 provides:

> "*Use of drugs or instruments to prevent conception.* Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned."

Section 54-196 provides:

> "*Accessories.* Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender."

QUESTIONS PRESENTED

1. Whether Sections 53-32 and 54-196 of the General Statutes of Connecticut, on their face or as applied in this case, deprive these appellants of liberty or property without due

process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

2. Whether Sections 53-32 and 54-196 of the General Statutes of Connecticut, on their face or as applied in this case, deprive these appellants of their rights to freedom of speech in violation of the First and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

Appellant C. Lee Buxton is a physician, licensed to practice in the State of Connecticut and Chairman of the Department of Obstetrics and Gynecology at the Yale Medical School (R. 17). He is an author in the field of his specialty and a leader in professional organizations concerned with that field (R. 17).

Appellant Estelle T. Griswold is Executive Director of the Planned Parenthood League of Connecticut (R. 17).

On November 1, 1961, following the decision of this Court in *Poe* vs. *Ullman*, 367 U.S. 497 (1961), the Planned Parenthood Center of New Haven was opened (R. 16-7). The purpose of the Center was to provide information, instruction and medical advice to married persons as to the means of preventing conception, and to educate married persons generally as to such means (R 17).

The Center occupied eight rooms of the building in which it was situated (R. 17). Dr. Buxton was Medical Director of the Center (R. 17). Mrs. Griswold was Acting Director of the Center in charge of its administration and its educational program (R. 17).

During the period of its operation, from November 1 to November 10, the Center made information, instruction, edu-

cation and medical advice on birth control available to married persons who sought it (R. 17).

With respect to a woman who came to the Center seeking contraceptive advice the general procedure was to take her case history and explain to her various methods of contraception. She was then examined by a staff doctor, who prescribed the method of contraception selected by her unless it was contraindicated. The patient was furnished with the contraceptive device or material prescribed by the doctor, and a doctor or nurse advised her how to use it. Fees were charged on a sliding scale, depending on family income, and ranged from nothing to $15. (R. 18-9).

Dr. Buxton, as Medical Director, made all medical decisions with respect to the facilities of the Center, the procedure to be followed, the types of contraceptive advice and methods available, and the selection of doctors to staff the Center (R. 18). In addition, on several occasions, as a physician he examined and gave contraceptive advice to patients at the Center (R. 18). Mrs. Griswold on several occasions interviewed persons coming to the Center, took case histories, conducted group orientation sessions describing the methods of contraception and, on one occasion, gave a patient a drug or medical article to prevent conception (R. 20).

Among those who went to the Center seeking contraceptive advice were three married women. They followed the procedure described above, were given contraceptive material prescribed by the doctor, and subsequently used the material for the purpose of preventing conception. (R. 20-2).

On November 10, 1961, after Dr. Buxton and Mrs. Griswold were arrested, the Center closed (R. 18).

The Prior Litigation And The State Court's Interpretation Of Sections 53-32 And 54-196.

The Connecticut Supreme Court of Errors has passed upon the interpretation and validity of Sections 53-32 and 54-196 on four occasions prior to its decision in the case at bar:

In *State* vs. *Nelson*, 126 Conn. 412, 11 A.2d 856, decided in 1940, two physicians and a nurse were charged with assisting, abetting and counseling a married woman to use contraceptive devices under conditions where, in the opinion of the physician, "preservation of the general health" of the patient required such use to prevent conception. A demurrer to the information was sustained by the trial court on due process grounds. The Supreme Court of Errors, in a three to two decision, reversed the lower court and upheld the validity of the statutes. The Court construed the statutes as applying in all circumstances, regardless of health factors, but expressly did not decide whether an implied exception would be recognized where "pregnancy would jeopardize life" (126 Conn. at 418, 11 A.2d at 859).

The *Nelson* case involved the operation of a birth control clinic in Waterbury. At that time nine such clinics were functioning in Connecticut. Following the *Nelson* decision all the clinics in the State closed down. On remand to the trial court the Nelson prosecution was nolled.[2]

Shortly afterwards, Dr. Wilder Tileston, another Connecticut physician, brought a declaratory judgment action to determine

---

[2] See 367 U.S. at 532. At the same time as it decided the *Nelson* case the Supreme Court of Errors, in a companion case, ruled that the Connecticut search and seizure laws did not authorize the seizure and destruction of the contraceptive materials in possession of the Waterbury clinic. *State* vs. *Certain Contraceptive Materials*, 126 Conn. 428, 11 A.2d 863 (1940).

whether Sections 53-32 and 54-196 made it unlawful for him to prescribe the use of contraceptive devices for married women, living with their husbands, in cases where in his professional judgment a pregnancy might result in death or serious injury to health. In *Tileston* vs. *Ullman*, 129 Conn. 84, 26 A.2d 582 (1942), the Supreme Court of Errors, again by a three to two vote, ruled that the statutes were to be construed as an absolute prohibition and permitted no exception under any circumstances. In the opinion of the majority the Legislature "was entitled to believe" that the alternative available to the women, namely, abstinence from marital relations, "was reasonable and practical" (129 Conn. at 93, 26 A.2d at 587). The majority again sustained the statutes against the due process challenge. On appeal, this Court dismissed the case, without reaching the merits, on the ground that Dr. Tileston did not have standing to raise the constitutional rights of his patients. *Tileston* vs. *Ullman*, 318 U.S. 44 (1943).

The issues were raised again some years later in a group of declaratory judgment suits. Dr. C. Lee Buxton, appellant here, brought one of these suits, asserting his own rights to liberty and property in the practice of his profession and urging that such rights were infringed by legislation which prevented him from prescribing, in accordance with accepted medical practice, contraceptive devices to three married women who were plaintiffs in the other suits. In the case of one such plaintiff, a further pregnancy "would be exceedingly dangerous to her life." *Buxton* vs. *Ullman*, 147 Conn. 48, 52, 156 A.2d 508, 511 (1959). In another case a married couple had had three abnormal children, no one of whom lived more than ten weeks, the cause of these abnormalities was thought by the physicians to be genetic, and the prospect of another pregnancy was "extremely disturbing" to the couple (147 Conn. at 53, 156 A.2d at 511). In a further case, a married couple had

had four children, none of whom had lived, and because of blood factor incompatibilities of the plaintiffs "the prospects that they can procreate a normal child is (*sic*) highly unlikely" (*ibid*). All the plaintiffs based their claims on due process. Demurrers to the complaints were sustained and the Supreme Court of Errors, this time unanimously, affirmed, considering the issues foreclosed by the prior decisions. On appeal, a majority of this Court held that the "fact that Connecticut has not chosen to press the enforcement of this statute deprives these controversies of the immediacy which is an indispensable condition of constitutional adjudication." *Poe* vs. *Ullman*, 367 U.S. 497, 508 (1961).

In the fourth case a young married couple brought a declaratory judgment action on the ground that the Connecticut statutes would deprive them of their rights, under the due process clause, to obtain medical advice on proper methods of contraception, "thereby avoiding the possibility that children will be conceived before these plaintiffs are prepared psychologically or economically for the duties and obligations of parenthood." *Trubek* vs. *Ullman*, 147 Conn. 633, 165 A.2d 158 (1960). The Supreme Court of Errors, holding that the issues were concluded by previous decisions, affirmed the trial court's dismissal of the action. Appeal was dismissed and petition for certiorari denied by this Court. *Trubek* vs. *Ullman*, 367 U.S. 907 (1961).

As a result of these four decisions, together with the one rendered in the case at bar, it is clear that the Supreme Court of Errors has interpreted Sections 53-32 and 54-196 to mean that a physician is prohibited from advising or prescribing, and all persons are prohibited from using, contraceptive devices, regardless of whether:

(1) The persons involved are married and living together.

(2) The devices are prescribed by a licensed physician in accordance with "generally accepted medical practice" (126 Conn. at 419, 11 A.2d at 859).

(3) Contraceptive measures are "necessary to protect and procure the best possible state of health and well being" (126 Conn. at 415, 11 A.2d at 858).

(4) Pregnancy will seriously jeopardize life or health or result in defective or abnormal children or in still-births.

It is also clear, however, that Sections 53-32 and 54-196 do not prohibit the sale or use of contraceptive devices in Connecticut for the prevention of disease, as distinct from the prevention of conception. The Supreme Court of Errors has not directly ruled on this question. But the conclusion is apparent from the following considerations:

(1) Section 53-32 applies only to the use of contraceptive devices "for the purpose of preventing conception." It contains no reference to their use for other purposes, including the well-known practice of selling and using such devices for the prevention of disease.

(2) The Supreme Court of Errors has consistently cited with approval and relied upon the decisions of the Massachusetts Supreme Judicial Court interpreting the Massachusetts anti-contraceptive law (126 Conn. at 419, 421-2, 425, 11 A.2d at 859, 860, 862; 129 Conn. at 88, 89-91, 26 A.2d at 585, 585-6). That law does not forbid the use of contraceptive devices, but its prohibition does extend to any person who "sells, lends, gives away, exhibits, or offers to sell, lend or give away . . . any drug, medicine, instrument or article whatever for the prevention of conception." Mass. G.L. (Ter. ed.) Chap. 272, § 21. In *State* vs. *Nelson* the Connecticut Supreme Court of Errors grouped the Massachusetts and Connecticut statutes in the same category of state anti-contraceptive laws, as ones that

"attempt complete suppression" (126 Conn. at 420, 11 A.2d at 860). And in *Tileston* vs. *Ullman* it referred to the Massachusetts statute as a "similar statutory prohibition" (129 Conn. at 89, 26 A.2d at 585). In *Commonwealth* vs. *Corbett*, 307 Mass. 7, 29 N.E. 2d 151 (1940), it was held that the Massachusetts statute did not prevent the sale of contraceptive devices for the prevention of disease. And in *Tileston* the Connecticut Supreme Court of Errors expressly noted this interpretation and by clear implication accepted it (129 Conn. at 91, 26 A.2d at 586).

3. This Court may take judicial notice of the statement of the Connecticut official charged with administration of State laws pertaining to the sale of drugs that certain contraceptive devices may be prescribed by physicians for therapeutic purposes. In a letter dated September 15, 1954, which is a public record under Section 1-19 of the Connecticut General Statutes, the Commissioner of Food and Drugs wrote to the Secretary of the Bridgeport Pharmaceutical Association:

> "Since diaphragms have such therapeutic and other uses there is no reason why vaginal diaphragms may not be prescribed or ordered by a physician and such order filled by a pharmacist."

4. This Court may also take judicial notice that no prosecution has ever been brought in Connecticut charging violation of Section 53-32 by prescription, sale or use of contraceptive devices for the prevention of disease.

5. In *Poe* vs. *Ullman*, 367 U.S. 497, 502 (1961), the majority opinion noted: "We are advised by counsel for appellants that contraceptives are commonly and notoriously sold in Connecticut drug stores." And the Court relied upon this fact. In the trial of the case at bar the effort of appellants to introduce evidence to prove the statement made by counsel in *Poe* was ex-

cluded as irrelevant (R. 24-5). We repeat the statement of counsel in the *Poe* case.

In summary, then, Sections 53-32 and 54-196 do not apply to the use of contraceptive devices other than for prevention of conception, but for that purpose their use is precluded completely and without any exception.

SUMMARY OF ARGUMENT

I. Appellants, as defendants in a criminal prosecution, have standing to raise the constitutional issues presented here. Having this standing, they may raise all subsidiary questions bearing on the validity of the statutes, including the constitutional rights of their patients and potential patients.

II. The Connecticut anti-contraceptive statutes deny appellants the right to liberty and property without due process of law in violation of the Fourteenth Amendment:

A. The issues here are governed by the rules of due process as applied in cases where the governmental regulation touches upon fundamental individual and personal rights, not as applied in cases which involve commercial and property rights.

B. The legislative objectives sought by the Connecticut statutes have never been clearly enunciated, and hence the deference due the legislative judgment in this case is minimal.

C. The statutes, if designed as a health measure, are not reasonably related to the achievement of that objective, and are arbitrary and capricious.

D. The statutes were not intended as a device to maintain or increase the population of Connecticut and, if they were, would not constitute a reasonable method of achieving that objective.

E. If it were an objective of the statutes to restrict sexual intercourse to the propagation of children, that would not be a proper legislative purpose.

F. The statutes, considered as an effort to promote public morality by prohibiting the use of certain extrinsic aids to avoid conception, even within the marital relation, do not meet the applicable standards of due process. Where legislation is designed to promote public morality, due process requires that (1) the moral practices regulated by the statute be objectively related to the public welfare; or (2) if such is not the case (assuming this in itself is not sufficient to invalidate the statute), then the regulation must conform to the predominant view of morality prevailing in the community; in any event (3) the operation of the statute, weighing benefits against detriments, cannot be arbitrary or capricious. The statutes here fail to meet any of these tests.

G. The statutes, considered as an effort to protect public morals by discouraging sexual intercourse outside the marital relation, are not reasonably designed to achieve that end and impose restrictions on fundamental liberties far beyond what is necessary to accomplish such a purpose.

III. The Connecticut statutes violate due process in that they constitute an unwarranted invasion of privacy. Whether one derives the right of privacy from a composite of the Third, Fourth and Fifth Amendments, from the Ninth Amendment, or from the "liberty" clause of the Fourteenth Amendment, such a constitutional right has been specifically recognized by this Court. Although the boundaries of this constitutional right of privacy have not yet been spelled out, plainly the right extends to unwarranted governmental invasion of (1) the sanctity of the home, and (2) the intimacies of the sexual relationship in marriage. These core elements in the right to privacy are

combined in this case. As Mr. Justice Douglas and Mr. Justice Harlan, the only Justices to reach the merits in *Poe* vs. *Ullman*, have pointed out, the Connecticut statutes constitute a shocking invasion of the protected private sector of life.

IV. The Connecticut statutes violate the First Amendment as incorporated in the Fourteenth:

A. The statutes are invalid on their face because they apply to "counseling" and other areas of speech.

B. The findings and conclusions of the trial court rested upon conduct within the area of protected speech. This failure of the courts below to separate speech from action renders the application of the statutes in this case invalid.

POINT I.

Appellants Have Standing To Raise The Constitutional Issues Presented Here. Having This Standing They May Raise All Subsidiary Questions Bearing On The Validity Of The Statutes, Including The Constitutional Rights Of Their Patients And Potential Patients.

The question involved in *Poe* vs. *Ullman*, 367 U.S. 497 (1961) — that the Connecticut statutes have not been enforced — is no longer at issue here. By this prosecution Connecticut is attempting to enforce Sections 53-32 and 54-196 against these appellants. The fact that this prosecution, like the *Nelson* prosecution, is directed against the operation of a birth control center does not affect the issue. Plainly this case involves a real, not a hypothetical, controversy.

As defendants in a criminal prosecution, appellants have standing to assert that the Connecticut statutes applied to them deprive them of due process of law and the right to freedom of speech under the United States Constitution, — issues consistently pressed by them throughout this litigation. Having standing to raise these issues, appellants may invoke in support of their position the rights of other persons affected by the operation of the statutes. These conclusions follow from the following considerations:

A.

Appellant Buxton, as a licensed physician, has a property right in the practice of his profession. Appellant Griswold, as Director of the Planned Parenthood League and as Acting Di-

rector of the Center, has a similar property right to engage in her occupation. Appellant Buxton also has the right to use assistants necessary to his practice. This Court has consistently held that these property rights may be restricted by State legislation only if such legislation meets the standards of due process of law under the Fourteenth Amendment. *Dent* vs. *West Virginia*, 129 U.S. 114 (1889); *Pierce* vs. *Society of Sisters*, 268 U.S. 510 (1925); *Wieman* vs. *Updegraff*, 344 U.S. 183 (1952); see also *Truax* vs. *Raich*, 239 U.S. 33 (1915).

Since appellants are asserting their own constitutional rights to enjoy property they may also invoke the rights of persons with whom they have a professional relationship upon which their property rights depend. Thus, in *Truax* vs. *Raich*, *supra*, an employer was permitted to assert the rights of his employees; and in *Pierce* vs. *Society of Sisters*, *supra*, the owners of a private school were entitled to assert the rights of potential pupils and their parents. See also *Bantam Books, Inc.* vs. *Sullivan*, 372 U.S. 58, 64-5, footnote 6 (1963).

Furthermore, since the standards of due process require that the State legislation be not arbitrary, capricious or unreasonable, and since appellants challenge the statutes as invalid on their face, appellants may present to this Court all arguments touching upon the arbitrary character of the law, whether those features affect appellants directly or indirectly. *Aptheker* vs. *Secretary of State*, 378 U.S. 500 (1964); *Baggett* vs. *Bullitt*, 377 U.S. 360 (1964); *Cramp* vs. *Board of Public Instruction*, 368 U.S. 278 (1961); *Butler* vs. *Michigan*, 352 U.S. 380 (1957); *Thornhill* vs. *Alabama*, 310 U.S. 88 (1940). Indeed, the very meaning of attacking a statute as void on its face is that the statute is invalid in all its applications, not merely in its appli-

cation to the particular party bringing the challenge.[1]

B.

Appellants' liberties, also protected under the due process clause of the Fourteenth Amendment, are likewise restricted by the statutes involved here. Under our constitutional system appellants have the right to engage in activity, public or private, for the betterment of mankind or for the pleasure of themselves, as individuals or in association with others, and governmental restrictions upon such activities must conform to the standards of due process of law. As this Court said in *Meyer* vs. *Nebraska*, 262 U.S. 390, 399 (1923), "Without doubt, [that liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." And the Court has recognized and protected against unconstitutional infringement not only the liberty of individuals to learn, as in *Meyer*, but the liberty to conduct a school (*Pierce* vs. *Society of Sisters*, *supra*); to form an association for advancement of civil rights

---

[1] Appellee, in its Motion to Dismiss Appeal, argued that appellants had raised below only the question whether the statutes were invalidly applied in this case, and not the question of whether they were invalid on their face (pp. 3-5). This is not correct. It is true that, in order to make clear the difference between this case and *Tileston* vs. *Ullman*, 318 U.S. 44, appellants asserted that the statutes "as applied to" them were unconstitutional (see, *e.g.*, R. 2, 8, 35-6, 54). But appellants consistently asserted that the statutes were void as a whole, not only in their application in this case (see *e.g.*, R. 27, 34). And the three courts below all dealt with the constitutional issues on this basis (see, *e.g.*, R. 9-11, 46-7, 47-8, 62-3).

(*N.A.A.C.P.* vs. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958)); and to travel (*Aptheker* vs. *Secretary of State, supra*). The action of these appellants, in opening a center to deal with the human and social problems of parenthood and population, clearly falls within this category of protected liberty.

In addition appellant Buxton, at least, invokes another form of liberty: the right to intellectual freedom in the pursuit of knowledge in his chosen field of inquiry, and the right to practice his profession in accordance with scientifically accepted principles. Such liberties, also, have been given recognition by this Court. *Wieman* vs. *Updegraff*, 344 U.S. at 195-198 (concurring opinion); *Sweezy* vs *New Hampshire*, 354 U.S. 234, 250-1, 261-4 (1957); *Barenblatt* vs. *U.S.*, 360 U.S. 109, 112 (1959); *Baggett* vs. *Bullitt*, 377 U.S. at 369-72. They are closely related to the fundamental right to freedom of expression, guaranteed by the First Amendment, but differ in that they may involve action as well as expression. Their protection against arbitrary or capricious government control demands special scrutiny.

Since appellants have standing to raise these issues, as in the case of their claims based on property rights, they may assert the rights of others which affect enjoyment of their own rights and, challenging the statutes on their face, may advance all considerations pertaining to the arbitrary character of the statutes as a whole. See cases cited *supra* in subsection A.

C.

It is conceded that, by Connecticut law, in order to convict under the aiding and abetting statute (Section 54-196), the court must find that an offense has been committed under the principal statute (Section 53-32). *State* vs. *Wakefield*, 88 Conn. 164, 90 A. 230 (1914); R. 12. Obviously, the principal offense

must be one which can constitutionally be made an offense. Were this not so, the aiding and abetting statute would constitute a denial of due process of law. Hence it is necessary for the Court here to consider, on all applicable constitutional grounds, the validity of Section 53-32. In fact, appellants cannot assert their rights under the due process clause except by attacking the validity of the use statute. The Court has consistently followed this principle in similar situations. *N.Y. Central R.R. Co.* vs. *White*, 243 U.S. 188, 197 (1917); *Mountain Timber Co.* vs. *Washington*, 243 U.S. 219, 234 (1917); *Anderson National Bank* vs. *Luckett*, 321 U.S. 233, 240-7 (1944); *International Harvester Co.* vs. *Wisconsin Dept. of Taxation*, 322 U.S. 435, 440 (1944); *Hanson* vs. *Denckla*, 357 U.S. 235, 244-5 (1958). See also *U.S.* vs. *Raines*, 362 U.S. 17, 20-4 (1960). In other words, the constitutional rights of appellants here are assimilated to the rights of persons affected by the principal statute, and appellants are entitled to raise all issues which such persons could raise.

D.

Appellants are also entitled to invoke the rights of other persons subject to Section 53-32 under the doctrine of such decisions as *Barrows* vs. *Jackson*, 346 U.S. 249 (1953). In that case a white defendant, party to a racially restrictive covenant, was being sued for damages by the covenantor who claimed that the defendant had conveyed the property to a Negro in violation of the covenant. The Court held that the defendant could raise the issue that enforcement of the covenant violated the rights of Negroes to equal protection of the laws, although no Negro was a party to the suit. The decision rested primarily upon grounds that, unless the defendant was permitted to raise the issue, important constitutional rights would not be effectively protected.

A comparable situation exists in the case at bar. Appellants, as defendants to a criminal prosecution, have standing as parties to the proceeding. At stake in the litigation are fundamental rights of other persons affected by the operation of the statute. Those persons are connected with appellants, not by contract, but through a professional relationship, as patients or potential patients at the Center. In view of *Tileston* vs. *Ullman*, and the lack of active enforcement against individual violators of Section 53-32, the rights of those persons are not likely to be effectively protected unless they are considered by the Court in this litigation.

Other cases of a similar nature, where parties to a litigation have been allowed to assert the rights of other persons whose interests were closely linked with the outcome of the proceeding, include *Truax* vs. *Raich*, 239 U.S. 33 (1915); *Meyer* vs. *Nebraska*, 262 U.S. 390 (1923); *Pierce* vs. *Society of Sisters*, 268 U.S. 510 (1925); *Adler* vs *Board of Education*, 342 U.S. 485 (1952); *N.A.A.C.P.* vs. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *N.A.A.C.P.* vs. *Button*, 371 U.S. 415 (1963). See also *Joint Anti-Fascist Refugee Committee* vs. *McGrath*, 341 U.S. 123 (1951); *Mapp.* vs. *Ohio*, 367 U.S. 643 (1961); Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 Yale L.J. 599 (1962).

Tileston vs. *Ullman*, 318 U.S. 44 (1943), is not apposite here. The party seeking to raise the issues in that case was a plaintiff in a declaratory judgment action, a form of proceeding where the requirements of standing are especially strict. Most important, the plaintiff physician there raised no issue of his own rights. "The sole constitutional attack upon the statutes," the Court emphasized, "is confined to their [the patients'] deprivation of life — obviously not appellant's." 318 U.S. at 46. And, so far as appeared in that case, there was no bar to those pa-

tients raising the issues in their own behalf in another proceeding.

Here the parties are defendants in a criminal prosecution. They raise constitutional defenses based upon their own rights to liberty and property under the Fourteenth Amendment, and to freedom of expression under the First and Fourteenth Amendments. Their guilt under the accessory statute depends upon a constitutionally valid offense having been committed by their patients. And it is now clear that the constitutional right to operate a birth control center, and of persons unable to afford private medical advice to make use of those facilities, can only be effectively protected through this litigation.

For these reasons, we submit, appellants not only have standing to raise the constitutional questions presented here, as the action of the State directly affects them, but they are also entitled to have the Court consider all aspects of the operation of the statutes under attack, including the constitutional rights of their patients and potential patients.

POINT II.

The Connecticut Anti-Contraceptive Statutes Deny Appellants The Right To Liberty And Property Without Due Process Of Law In That They Are Arbitrary And Capricious, And Have No Reasonable Relation To A Proper Legislative Purpose.

A. The Basic Standards Of Due Process.

In *Meyer* vs. *Nebraska*, 262 U.S. 390 (1923), a State statute which prohibited the teaching of the German language to pupils who had not passed the eighth grade was attacked on due process grounds as violating the right of teachers to teach and parents to instruct their children. Holding the statute invalid, this Court laid down the requirements of the due process clause in the following terms:

> "The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts." (pp. 399-400).

In *Nebbia* vs. *New York*, 291 U.S. 502 (1934), a State statute regulating the price of milk was attacked on due process grounds as violating the right of commercial enterprises to conduct their business without arbitrary governmental restrictions. Upholding the validity of the statute, the Court restated the requirements of the due process clause:

> "If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbi-

trary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio*." (p. 537).

The standards imposed on State legislatures by the due process clause are thus well settled. In sum, they are that the legislation (1) must have a reasonable relation (2) to a proper legislative purpose, and (3) be not otherwise arbitrary or capricious.

In applying this doctrine, however, it is vital to emphasize the difference between the two situations typified by *Meyer* and *Nebbia*. In *Meyer* the legislation touched upon rights of a fundamental individual and personal character, essential to maintaining the independence, integrity and private development of a citizen in a highly organized, yet democratic, society. In *Nebbia* the legislation dealt with economic regulation of commercial and property rights, essential to maintaining the public interest in controlling a highly complex, industrialized society. The distinction is basic in striking the balance between public interest and private right in a modern, technologically developed nation.

And it follows that the function of this Court in reviewing legislation must be somewhat different in the two situations. The Court has, indeed, recognized this difference. Since *Nebbia* it has uniformly applied due process standards to allow Federal and State legislatures full leeway in their judgments as to the need and propriety of all types of economic regulation. See, *e.g.*, *West Coast Hotel Co.* vs. *Parrish*, 300 U.S. 379 (1937); *Lincoln Federal Labor Union* vs. *Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949); *Berman* vs. *Parker*, 348 U.S. 26 (1954); *Williamson* vs. *Lee Optical Co.*, 348 U.S. 483 (1955). At the same time it has subjected to much more intensive scrutiny under the due process clause legislation which impairs the

freedom of the individual to live a fruitful life or to sustain his position as citizen rather than subject. *Pierce* vs. *Society of Sisters*, 268 U.S. 510 (1925); *Wieman* vs. *Updegraff*, 344 U.S. 183 (1952); *Slochower* vs. *Board of Education*, 350 U.S. 551 (1956); *Schware* vs. *Board of Bar Examiners*, 353 U.S. 232 (1957); *Aptheker* vs. *Secretary of State*, 378 U.S. 500 (1964).

The rights at stake in this litigation plainly fall within the latter category. Although regulation of the medical profession may at times involve restriction of commercial activities, or concern the needs of the public for safe and competent medical practices, that is not the thrust of the legislation here. Rather, the rights of appellants being abrogated are the right to practice medicine in accordance with scientifically accepted medical principles, the right to disseminate information, and the right to make available safe and effective medical services to those members of the community unable to afford or ignorant of the private facilities. And the rights of appellants' patients, also at stake here, are even more personal and equally fundamental. They concern the most intimate aspects of the marital relationship, the right to plan a family, the right to happiness, to health and even to life itself. State legislation impinging on these rights, we submit, should be subjected to the most careful inspection by this Court.

We are not, in short, asking here for reinstatement of the line of due process decisions exemplified by *Lochner* vs. *New York*, 198 U.S. 45 (1905). But we are asking the Court to adhere to the principles of the *Meyer* case:

> "That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected." (262 U.S. at 401).

B. The Objectives Of The Connecticut Statutes.

In order to apply the standards of due process to the Connecticut statutes here involved, it is first necessary to determine the precise objectives sought to be achieved by the legislature. Yet the purposes of the law are shrouded in obscurity. Section 53-32 was originally passed in 1879, as part of an amendment to the general obscenity statute, entitled "An Act to Amend an Act concerning Offenses against Decency, Morality, and Humanity." [1] It is a relic of Comstockery, a psychological attitude which, if it ever were, is no longer part of the mainstream of American life and thought. [2] It was modeled on the Federal law of 1873, 17 Stat. 598, and was comparable to legislation passed in a number of other States during the Comstock period. [3] But, with the exception of Connecticut and Massachusetts, those laws have not been construed as prohibiting the type of activities in which appellants here engaged. [4]

From the four decisions in which the Connecticut Supreme Court of Errors has dealt with the statutes (Statement of the

---

[1] Chapter 78 of the Public Acts of 1879. In a revision of the General Statutes in 1888, the obscenity law was broken up, and the part dealing with contraceptives was put in a separate section. Gen. Stats., 1888, § 1539. The 1879 amendment and the prior obscenity statute are quoted in the dissenting opinion of Judge Avery in *Tilcston* vs. *Ullman*, 129 Conn. 84, 98-9, 26 A.2d 582, 589.

[2] See Broun and Leech, *Anthony Comstock* (1927); Haney, *Comstockery in America* (1960), pp. 18-25.

[3] See Dennett, *Birth Control Laws* (1926), pp. 19-29.

[4] See, *e.g.*, *Bours* vs. *U.S.*, 229 F. 960 (C.A. 7, 1915); *Youngs Rubber Corp.* vs. *C. I. Lee & Co.*, 45 F.2d 103 (C.A. 2, 1930); *Davis* vs. *U.S.*, 62 F.2d 473 (C.A. 6, 1933); *U.S.* vs. *One Package*, 86 F.2d 737 (C.A. 2 1936); *Consumers Union of U.S.* vs. *Walker*, 145 F.2d 33 (C.A. D.C., 1944). See Comment, *The History and Future of the Legal Battle Over Birth Control*, 49 Corn. L.Q. 275, 283-5, (1964).

Case, *supra*) we have endeavored to cull all the various objectives which have been suggested at one time or another. Apart from general, and unenlightening, references to public "health," "safety," "morals," and "welfare," the more specific possible legislative purposes may be listed as follows:

(1) To protect persons from the use of drugs or devices injurious to health or life. *State* vs. *Nelson*, 126 Conn. at 425, 11 A.2d at 862.

(2) To maintain and increase the population. *State* vs. *Nelson*, 126 Conn. at 425-6, 11 A.2d at 862.

(3) To restrict sexual intercourse to the propagation of (legitimate) children. *State* vs. *Nelson*, 126 Conn. at 425, 11 A.2d at 862; *Tileston* vs. *Ullman*, 129 Conn. at 90, 26 A.2d at 585.

(4) To promote public morals by prohibiting the use of particular methods of avoiding conception, *i.e.* those employing extrinsic aids, even within the marital relation. *State* vs. *Nelson*, 126 Conn. at 424, 11 A.2d at 861.

(5) To protect public morals by discouraging sexual intercourse outside the marital relation. *State* vs. *Nelson*, 126 Conn. at 421, 424-5, 11 A.2d at 860, 861-2; *Tileston* vs. *Ullman*, 129 Conn. at 90, 26 A.2d at 585-6.

The Supreme Court of Errors has never clearly declared which one, or which combination, of these possible objectives the Connecticut legislature in 1879 sought to achieve. Indeed, in its last three decisions that Court seems to have abandoned the attempt to state the legislative purpose altogether. Under such circumstances the deference owed by this Court to the legislative judgment is surely minimal.

Of the possible objectives listed, most probably only the last two require serious consideration. Nevertheless we undertake

in the following sections to apply the standards of the due process clause to each one, in the order given above.

It should be added that the issues must be decided here on the basis of current circumstances, not those existing in 1879 or earlier this century. *Block* vs. *Hirsh*, 256 U.S. 135, 155. (1921); *Chastleton Corp.* vs. *Sinclair*, 264 U.S. 543, 547-8 (1924); *Brown* vs. *Board of Education*, 347 U.S. 483, 492-3 (1954). Hence the material we present will deal with existing knowledge and conditions.

C. The Statutes, If Designed As A Health Measure, Are Not Reasonably Related To The Achievement Of That Objective, And Are Arbitrary And Capricious.

In *State* vs. *Nelson* the Connecticut Supreme Court of Errors somewhat casually remarks that, "Like an advertisement representing that and how venereal disease can be easily and cheaply cured, information and advice as to means, or furnishing materials intended for, contraception may be said to have 'a decided tendency to . . .' expose interested and uninformed persons to dangers from the use of drugs and devices injurious to health or even life." 126 Conn. at 424-5, 11 A.2d at 861-2.

It seems most unlikely, in view of the Comstockian background, that the Connecticut legislature had any such health purpose in mind. In any event, the legislation is not reasonably related to the achievement of that end. Contraceptive drugs or devices are not inherently harmful or dangerous. On the contrary, as will be shown later, their prescription is accepted medical practice; and in many cases they are the safest and most effective way to preserve health and life (see Section F, *infra*). Whatever threat to health they might possibly entail, if sold without restriction, can be met by conventional measures for licensing and supervision, as is done in the case of

thousands of other medical products and as is done in the case of contraceptive devices in other States. Indeed, food and drug legislation designed to safeguard the public health has during the last few years reached a high point in extensive application and effective administration. To seek protection of the public health by prohibiting the use of contraceptive devices entirely, through a criminal statute, is absurd. And to seek that protection by prosecuting a noted specialist in the use of such devices, operating through carefully safeguarded procedures in their prescription and use, is doubly absurd.

It is, in short, impossible to conceive that the health objective was a significant factor in the passage of this legislation or has been a serious consideration in retaining the law on the statute books. And, even if it were, the law goes far beyond the requirements of a health regulation, and impinges so drastically upon basic individual rights, that it cannot stand upon any basis of reasonableness. See *Shelton* vs. *Tucker*, 364 U.S. 479 (1960); *Louisiana ex rel. Gremillion* vs. *N.A.A.C.P.*, 366 U.S. 293 (1961); *N.A.A.C.P.* vs. *Alabama ex rel. Flowers*, 377 U.S. 288 (1964); *Aptheker* vs. *Secretary of State*, 378 U.S. 500 (1964).

D. The Statutes Were Not Intended As A Device To Maintain Or Increase The Population Of Connecticut And, If They Were, Would Not Constitute A Reasonable Method Of Achieving That Objective.

The Supreme Court of Errors has never actually asserted that the anti-contraceptive statutes were passed by the Legislature for the purpose of maintaining or increasing the population of the State of Connecticut. In *State* vs. *Nelson* the Court did refer to this possible objective, introducing it as one that had been suggested by the defendants in that case, and saying: "If,

as the defendants suggest, a purpose, either principal or incidental, was to promote a maintenance and increase of the population, that would not be an inadmissible motive and the efficacy, to that end, of the provision would be a legislative question." 126 Conn. at 425-6, 11 A.2d at 862. In no other decision has the Supreme Court of Errors ever mentioned the matter. [5]

There is no evidence that the Comstock laws in general, or Connecticut's in particular, were based upon any such notion of population control. Their motivation was entirely different (see Section B, *supra*). The Supreme Court of Errors clearly recognized this in twice so obviously declining to advance the argument itself. As one commentator has said, "This explanation of the statute strains credulity." Note, *Connecticut's Birth Control Law: Reviewing a State Statute Under the Fourteenth Amendment*, 70 Yale L.J. 322, 330 (1960).

Nor can the Court supply this as a current objective of the statutes, or a reason why the statutes have been left on the books. Virtually the whole world now recognizes that the current problems of population control — crucial as they are — involve limitations on, not expansion of, the population explosion (see Section F, *infra*). It cannot be assumed that the current policy of the Connecticut legislature would run so

---

[5] The decision of the Appellate Division did refer to population control as a possible purpose of the statutes, saying:

"It is not alone for the preservation of morality in the religious sense that the legislature may have been impelled to act, but also for the perpetuation of race and to avert those perils of extinction of which states and nations have been alertly aware since the beginning of recorded history. Each civilized society has a primordial right to its continued existence and to the discouragement of practices that tend to negate its survival." R. 49.

But the Supreme Court of Errors did not refer to the point.

squarely counter to the entire direction of national and international developments in this field.

Furthermore, even if we presume that an increase in the population of Connecticut is an objective of the law, the measures adopted would not constitute a reasonable means of reaching that result. As already indicated, and as will be developed more fully later (see Section F, *infra*), the prohibitions of the law cut deeply into fundamental individual rights, including the right to protect life and health. On the other hand the factors determining the growth of population are so many and so complex,[6] that the measures prescribed by these statutes, especially if enforced only against birth control centers, would clearly not justify the human costs. Plainly other effective alternatives, far less serious in their abrogation of individual rights, are available to the Legislature, and due process requires that such "less drastic" means be employed. *Shelton* vs. *Tucker*, 364 U.S. 479, 488; *Aptheker* vs. *Secretary of State*, 378 U.S. 500, 508, 513-4; *cf. Dean Milk Co.* vs. *Madison*, 340 U.S. 349, 354-6 (1951).

Certainly this Court should not go out of its way to imply this purpose to the Connecticut legislature, when the Connecticut Supreme Court of Errors has not done so and when there is no suggestion that the Connecticut legislature has ever weighed or considered these difficult and disturbing judgments.

---

[6] See, *e.g.*, Wyon, *Field Studies on Fertility of Human Populations*, in *Human Fertility and Population Problems* (Greep ed., 1962) at pp. 79-105; Symposium, *Population Control*, 25 Law and Contemp. Prob. 377 (1960).

E. An Objective Of The Statutes To Restrict Sexual Intercourse To The Propagation Of Children Would Not Be A Proper Legislative Purpose.

That an objective of the Connecticut statutes is to restrict sexual intercourse to the propagation of (legitimate) children has never been explicitly stated by the Supreme Court of Errors. This idea seems to be implicit, however, in that Court's quotation with approval of the opinion of the Massachusetts Supreme Judicial Court, referring to laws of the Massachusetts and Connecticut variety: "Their plain purpose is to protect purity, to preserve chastity, to encourage continence and self-restraint, to defend the sanctity of the home, and thus engender . . . a virile and virtuous race of men and women." *State* vs. *Nelson*, 126 Conn. at 425, 11 A.2d at 862. The Connecticut Court added: "It is reasonable to assume that similar motives underlay the adoption of our own statute in 1879." *Ibid.*

In *Tileston* vs. *Ullman* the Supreme Court of Errors apparently reiterated these views, citing with approval a Massachusetts decision that the legislature "might take the view that the use of contraceptives would not only promote sexual immorality but would expose the commonwealth to other grave dangers." 129 Conn. at 90, 26 A.2d at 585.

If it be an objective of the law to restrict sexual intercourse to procreation — and such an aim would be consistent with the Comstock approach — then, we submit, this is not a proper legislative purpose under the requirements of the due process clause. However, since the matter has been left vague by the Supreme Court of Errors we do not feel it necessary to argue the question *in extenso* here. Much of what is said in the next section of this brief is equally applicable to this issue. Suffice it to say at this point, that such a legislative purpose would be so contrary to the basic drives of man, so far-reaching an in-

vasion of individual liberty, and so disruptive of our marriage and family institutions as they exist today, that it cannot be conceived as falling within the police power of the State to promote morals or the general welfare. In any event, this Court, again, should not accept such a drastic view of the law without a much more clear-cut statement from the Connecticut legislature or courts that the statutes were designed to accomplish this end.

F. The Statutes, Considered As An Effort To Promote Public Morality By Prohibiting The Use Of Certain Extrinsic Aids To Avoid Conception, Even Within The Marital Relation, Are Arbitrary And Capricious And Not Reasonably Related To A Proper Legislative Purpose.

We come now to a more plausible objective of the statutes, though again one which has never been clearly articulated by the Connecticut legislature or courts. The closest approach to this position occurs in the *Nelson* decision of 1940, where the Supreme Court of Errors remarks, " . . .it is not for us to say that the Legislature might not reasonably hold that the artificial limitation of even legitimate child-bearing would be inimical to the public welfare and, as well, that use of contraceptives, and assistance therein or tending thereto, would be injurious to public morals." 126 Conn. at 424, 11 A.2d at 861. And later, "The legislature might regard the use of materials designed to prevent conception as prejudicial to public morals and inimical to the welfare and interests of the community, as the general dissemination of information as to how it could be accomplished, like distribution of obscene literature, plainly would be." *Ibid.*

We will assume that the Court was saying here, not that the use of all methods of avoiding conception was injurious to

public morals (see Section E, *supra*), but that the use of "artificial" methods or "materials" would be. No similar statements are to be found in the other decisions of the Supreme Court of Errors, although general references to "public morality" may have been intended to encompass this idea. See *Tileston* vs. *Ullman*, 129 Conn. at 90, 94, 26 A.2d at 585, 587; *Buxton* vs. *Ullman*, 147 Conn. at 54-5, 156 A.2d at 512.

In order to appraise this position, it is first necessary to set forth some general medical information concerning various methods of avoiding conception. Then we examine the special problem of the meaning of the due process clause in relation to legislation which has as its purpose the promotion of "public morality." Thereafter we undertake to apply these standards of due process to the precise issue of public morality raised here.

1. The Medical Background.

There are a number of methods of avoiding conception, some known and practiced for many years, others recently developed by medical science. These methods vary in the degree to which they are reliable in preventing conception. One of the most recent studies by a leading clinician includes the following table showing the results of tests of the effectiveness and reliability of some of these contraceptive methods.[7]

---

[7] Garcia, *Clinical Studies on Human Fertility Control*, in Greep (ed.), *Human Fertility and Population Problems* (1963), p. 63.

Method	*Average pregnancy rate per 100 woman-years* [a]
Douche	31
Safe Period (rhythm)	24
Jelly alone	20
Withdrawal	18
Condom	14
Diaphragm (with or without jelly)	12
Enovid [b]	1.2

A somewhat similar grouping of the effectiveness of the various methods has been made by another leading authority in this field, Dr. Alan F. Guttmacher. His rankings, with the most reliable at the top and the least reliable at the bottom, are:

GROUP I.	Oral Pills.
GROUP II.	Diaphragm plus jelly or cream. Condom. Cervical Cap.
GROUP III.	Aerosol vaginal cream.

---

[a] This is the standard measurement of effectiveness used in these studies. To compute this rate the investigator determines for each married couple in the study the duration of exposure to the risk of pregnancy by deducting the aggregate months of married life during which conception was impossible because of pregnancy, separation, or some similar reason. The months of exposure and pregnancies of all couples under observation who used the same methods are added and the pregnancy rate per 100 woman-years of exposure computed.

In the instant study it was estimated that the average pregnancy rate without contraceptives for the same sample would have been approximately 150 to 200. See remarks of Dr. Tietze at page cited.

[b] Enovid is the trade name for one of the oral contraceptive pills now on the market.

GROUP IV.	Jelly or cream alone. Rhythm. Withdrawal.
GROUP V.	Suppositories. Vaginal Tablets.
GROUP VI.	Douche.

(The plastic coil inserted semi-permanently within the uterus is not yet generally available. Preliminary observations suggest that it may qualify for a Group II rating or even a rating between Groups I and II.) [10]

The plastic coil referred to by Dr. Guttmacher at the conclusion of the above table is only one of a number of intrauterine contraceptive devices which have been in use for a considerable period of time and are now being prescribed with far greater frequency by the medical profession. [11] With the new intrauterine devices the average pregnancy rates have been found to be 2.6 per 100 woman-years of exposure. [12]

To the methods just enumerated should be added abstinence and sterilization. Finally, abortion and miscarriage, while not

---

[10] Guttmacher, *The Complete Book of Birth Control* (1963), pp. 77-8. Other authorities confirm these conclusions. See, *e.g.*, Tietze, *The Clinical Effectiveness of Contraceptive Methods*, 78 American Journal of Obstetrics and Gynecology 650 (1959); Calderone (ed.), *Manual of Contraceptive Practice* (1964), p. 232.

[11] Tietze and Lewit (ed.), *Intra-Uterine Contraceptive Devices*, Proceedings of the Conference, April 30 - May 1, 1962, New York City, International Congress Series No. 54, published by Excerpta Medical Foundation.

[12] *Cooperative Statistical Program for the Evaluation of Intrauterine Contraceptive Devices*, 4th Progress Report; June 30, 1964.

In this connection it is interesting to note that the medical profession has been unable to determine the mechanism of the intrauterine devices. There is thus an interesting medical question with serious legal overtones as to whether such devices should properly be classed as contraceptives or as abortifacients. See, for instance, the comments of Dr. Calderone and Dr. Lehfeldt in *Intra-Uterine Contraceptive Devices*, *supra* note 11, at p. 110.

encompassed within the term "contraceptive," play an important role in birth control.

The objective of the Connecticut statutes — according to the premise we are now indulging — is to promote public morality by making it a criminal offense to prevent conception by some of the methods set forth above, but not others. The use of "any drug, medicinal article or instrument" would seem to include all the methods enumerated except withdrawal, abstinence, and the rhythm method (unless the rhythm method is supplemented by other means as noted *infra*). Those methods proscribed are sometimes referred to as "artificial" aids to contraception, as distinct from "natural." But we shall use the less pejorative term "extrinsic."

The Connecticut statutes, however, make a significant exception to the general rule. Sterilization, which involves use of an "instrument," is permitted under Connecticut law in certain medically prescribed situations. Conn. Gen. Stats., Sections 17-19 and 53-33. Abortion is also lawful in some similar circumstances. Conn. Gen. Stats., Sections 53-29 and 53-30.

It should also be noted that the distinction between extrinsic aids and other methods is not wholly clear-cut. Several types of "rhythm calendars" have been put on the market as an aid to determining the "safe" period in the use of the ryhthm method. There are also available for the same purpose special thermometers, chemicals to test the urine, and vaginal tampons to determine the presence of a substance which indicates ovulation time. [13]

---

[13] In *State* vs. *Nelson*, 126 Conn. at 427, 11 A.2d at 862-3, the Supreme Court of Errors stated that the use of calendars is not prohibited by Section 53-32. That Court has not passed upon the legality of the other devices which may be used in aid of the rhythm method of preventing conception.

In any event, allowing for these exceptions and ambiguities, the precise issue is whether the prohibition of those methods selected by the Connecticut legislature, viewed as a regulation to promote the public morality, conforms to the standard of due process of law.

2. The Standards Of Due Process In Legislation Aimed At Promotion Of Public Morality.

When legislation is designed to promote health, safety, or the general welfare in a material sense, its validity under the due process clause can be tested by considerations that can be objectively determined and rationally weighed. Questions of whether the statute is arbitrary or capricious, or has a reasonable relation to a proper legislative purpose, turn in such cases upon factual material which can be discovered and presented to the court, and upon value judgments which are subject to exposition and debate. The Brandeis brief is, of course, a classic illustration of this approach to the due process clause.

When the legislation is designed to promote public morality, however, the problem of applying the standards of due process may take a different form. In some cases, such as a statute prohibiting prostitution, the moral purposes may be justified by reference to objective and rational factors relevant to the promotion of the general welfare. But in other cases the legislature may undertake to legislate purely on the basis of moral principles not subject to objective evaluation. In such a case, how are the customary criteria of due process to be applied?

Certainly the court cannot take the position that the simple claim of a moral aim by the legislature satisfies the requirements of due process. As Mr. Justice Harlan said in *Poe* vs. *Ullman*, "the mere assertion that the action of the State finds justification in the controversial realm of morals cannot justify

alone any and every restriction it imposes." 367 U.S. at 545. Any such doctrine would immunize virtually all legislation from the mandate of the due process clause. It would allow the legislature to impose restraints upon individual liberties solely on the ground that some insignificant fraction of the community regarded the issue as a moral one. Thus, a law prohibiting women from appearing in public without veils, or forbidding women to use lipstick or cosmetics, even though some persons in the community might regard such practices as immoral, would surely be held an arbitrary infringement of personal liberty outlawed by the due process clause. What, then, should be the constitutional standards for applying the due process clause in cases where the legislature seeks to promote public morals?

We submit that the standard in such cases should at least be that (1) the moral practices regulated by the statute must be objectively related to the public welfare, or (2) in the event no such relationship can be demonstrated, the regulation must conform to the predominant view of morality prevailing in the community. In other words, if the legislature cannot establish that the law promotes the public welfare in a material sense, it cannot enforce the morality of a minority group in the community upon other members of the community. [14]

There is, so far as we are aware, no decision of the Supreme Court dealing with this exact problem. But the doctrine we urge here is fully supported by the obscenity cases. In *Roth* vs. *United States* a majority of the Court held that material al-

---

[14] It may be argued that the first standard set forth above is sufficient in itself, without the second. That is, if the moral principles cannot be objectively related to the public welfare, the legislation does not, for that reason alone, meet the standards of due process. It is not necessary to take that position in order to decide this case, however, and we do not consider it further here.

leged to be obscene could not be restricted unless it met the standard that "to the *average* person, *applying contemporary community standards*," the dominant theme appealed to prurient interests. 354 U.S. 476, 489 (1957). And it further adopted the provision in the A.L.I. Model Penal Code that material to be obscene must go "substantially beyond *customary* limits of candor." 345 U.S. at 487.

In subsequent cases a majority of the justices have reaffirmed this view that the test of obscenity must adhere to dominant community standards. Thus in *Manual Enterprises* vs. *Day*, Mr. Justice Harlan and Mr. Justice Stewart declared that, in order to sustain a conviction under Federal obscenity laws, the materials must be "deemed so offensive on their face as to affront *current community standards* of decency." 370 U.S. 478, 482 (1962). In *Jacobellis* vs. *Ohio*, Mr. Justice Brennan and Mr. Justice Goldberg, again referring to the A.L.I. Model Penal Code, repeated that obscenity must involve "a deviation from *society's* standards of decency." 378 U.S. 184, 191-2 (1964). In the same case Mr. Chief Justice Warren and Mr. Justice Clark expressly affirmed their support for the *Roth* rule. 378 U.S. at 199-200. Mr. Justice Harlan stated he would apply the *Roth* rule only to the Federal Government. 378 U.S. at 204. Mr. Justice Stewart, although employing the "hard core pornography" test, did not alter his views on the subject of community standards. 378 U.S. at 197. [15]

---

[15] The position that the community standards involved may be local rather than national standards is, as we read the cases, held by only three members of the Court: Mr. Chief Justice Warren, Mr. Justice Clark, and Mr. Justice Harlan.

Mr. Justice Black and Mr. Justice Douglas, of course, apply the standard that the First Amendment precludes any form of restriction upon expression alleged to be obscene. See *Roth* vs. *United States*, 354 U.S. at 508-14; *Jacobellis* vs. *Ohio*, 378 U.S. at 196-7. Hence their position does not employ the criterion of community standards.

The obscenity cases raise the same kind of problem as do the Connecticut statutes. In fact, as already pointed out, the Connecticut legislation had its origin in the Comstock laws, which were concerned primarily with matters of obscenity and decency. In both types of legislation the question is one of enforcing moral standards. It is true that the obscenity issues deal with rights under the First Amendment. The cases are not treated under traditional First Amendment doctrine, however, but rather in terms more appropriate to due process. And the individual rights infringed by the Connecticut statutes are fully as basic as the rights curtailed by obscenity laws.

We conclude, therefore, that in applying the standards of due process to the Connecticut statutes, taken as measures to promote public morality, the Court must consider (1) whether the law is objectively related to the public welfare; and (2) if it is not, whether it attempts to enforce on the entire community moral principles not conforming to the predominant view of morality held by the community. Furthermore, under the general standards of due process (see Section B, *supra*), even if the law satisfies the two requirements just stated, it must still meet the traditional test that its general operation be not arbitrary or capricious. This requires the Court to consider (3) whether the advantages of the law are greatly outweighed by its disadvantages, taking into account that the legislation abrogates fundamental rights of the individual, including the right to health and life.

We consider these three issues in the order stated.

3. The Prohibition Against Using Extrinsic Aids To Avoid Conception, Within The Marital Relationship, Is Not Objectively Related To The Public Welfare.

Neither the Connecticut legislature nor the Connecticut courts have ever claimed that the aim of promoting public

morals through a prohibition on the use of extrinsic aids to avoid conception can be justified upon objective grounds related to the public welfare.[16] That no such relationship exists is apparent from a brief review of accepted facts.

It is the virtually unanimous opinion of the medical profession that the use of extrinsic devices is not harmful to the individual either on physical or psychological grounds. The widespread use of such devices by physicians is in itself sufficient evidence of this opinion. Thus an inquiry made by Dr. Guttmacher of 3381 physicians in 1947 revealed that some 96 per cent expressed approval of contraception as a medical technique.[17] Medical text books fully support the position.[18] Leading medical schools throughout the country give students instruction in the use of contraceptive devices.[19] Medical associations endorse the prescription of such devices in medical

[16] The fifth possible purpose of the statutes — the promotion of public morality by discouraging sexual relations outside the marital status — may be objectively related to the public welfare. Our contention that, considered from this point of view, the statutes violate due process rests upon other grounds. See Section G, *infra*.

[17] Guttmacher, *Conception Control and the Medical Profession*, 12 Human Fertility 1, 2-3 (1947).

[18] See, *e.g.*, Greenhill, *Office Gynecology* (7th ed., 1959) p. 304; Stallworthy, et al., *Problems of Fertility in General Practice* (1953), p. 132; Stone and Himes, *A Practical Guide to Birth Control Methods* (1958), pp. 78-9, 131; Tietze, *The Condom as a Contraceptive*, National Committee on Maternal Health (1960) p. 39; Dickinson, *Techniques of Conception Control* (3d ed., 1950); Calderone (ed.), *Manual of Contraceptive Practice* (1964).

[19] See, *e.g.*, Stone, *The Teaching of Contraception in Medical Schools*, 7 Human Fertility 108 (1942); New York Academy of Medicine, *Report of the Committee on Public Health Relations* (1946).

practice.[20] The Federal Food and Drug Administration allows the shipment of contraceptive devices in interstate commerce and the Post Office permits them in the mails.[21] And the Connecticut Commissioner of Consumer Protection permits the sale on prescription for therapeutic purposes.[22] In addition contraceptive devices are legally prescribed and used in 48 of the 50

---

[20] See, *e.g.*, the policy statements adopted by the House of Delegates of the American Medical Association on December 2, 1964, which stated that "intelligent recognition of the problems that relate to human reproduction, including the need for population control, is . . . a matter of responsible medical practice," and declared: "In discharging this responsibility physicians must be prepared to provide counsel and guidance when the needs of their patients require it or refer the patients to appropriate persons . . . The prescription of child-spacing measures should be made available to all patients who require them, consistent with their creed and mores, whether they obtain their medical care through private physicians or tax or community-supported health services." (Not yet published in Journal of the American Medical Association). See also resolutions of American College of Obstetricians and Gynecologists, New York Times, April 24, 1963; American Public Health Association, adopted October 4, 1964 (not yet reported); Connecticut State Medical Society, in Proceedings, 1932, p. 76.

For additional data on the medical practice see briefs of Doctors and of Planned Parenthood Federation, Appendix B, amici curiae.

[21] N.Y. Times, May 10, 1960 (F.D.A.); N.Y. Times, Oct. 24, 1963 P.O.).

[22] Formerly titled the Commissioner of Food and Drugs. See Statement of the Case, *supra*.

States of the Union.[23] Indeed, in *Tileston* vs. *Ullman*, the Connecticut Supreme Court of Errors conceded that the "common denominator of the opinions of the various medical authorities, made a part of the record, is the professional opinion that the safest medical treatment which can be prescribed for these patients" would be the use of contraceptive devices. 129 Conn. at 91, 26 A.2d at 586.

Moreover, it cannot be argued that the use of extrinsic aids to contraception results in any injury to other individuals. Occurring in the privacy of the marital relation, such practices can have no effect whatever upon other persons. Nor has it been suggested that the use of these aids occasions any harm to marriage, family or other social institutions.

In short, no objective facts indicating harm to individuals or to society have been advanced to support the Connecticut statutes as moral prohibitions.

Indeed, quite the contrary, extrinsic aids to avoid conception are widely recognized as the best and most effective methods for solving numerous problems of individual health and well being, and for meeting many other needs arising from marriage and family relationships.

---

[23] The statues are collected in Comment, *The History and Future of the Legal Battle Over Birth Control*, 49 Corn. L.Q. 275, 277-9 (1964). See also brief of Planned Parenthood Federation, amicus curiae, Appendix A.

Since 1930 the Ministry of Health in England has authorized contraceptive advice to be given in government maternal and child welfare clinics to married women for whom a pregnancy would be detrimental. *Ministry of Health Memorandum*, No. 153 (1930); *Circular* 1208 (1931); *Circular* 1408 (1934); *Circular* 1622 (1937). Private practitioners may provide contraceptive advice regardless of the existence of medical reasons. Supplement to the British Medical Journal, Nov. 6, 1954, p. 166.

One of the most frequent reasons why a married couple may find it necessary or desirable to avoid conception relates to health. Under certain conditions a further pregnancy may surely or likely result in death. See, *e.g.*, *Poe* vs. *Ullman*, 367 U.S. at 500. Under other circumstances the medical prognosis may be that a pregnancy will end in a still-birth or a deformed or otherwise defective child. *Id.* at 498-9. Numerous other health conditions, physical and mental, may dictate the medical necessity or desirability of avoiding conception. [24]

In such situations it is accepted medical practice, so far as consistent with the religious or moral principles of the patient, to prescribe the use of extrinsic aids to avoid conception. As the data set forth above clearly demonstrate, the methods permitted by the Connecticut statutes — total abstinence, partial abstinence under the rhythm method, and withdrawal — are among the most unreliable. [25] They cannot safely be used, especially in cases involving danger of death or serious illness. [26]

In addition to health factors, there are other weighty reasons for married persons to postpone or avoid pregnancy. Economically the parents may not be able to support additional children, and may not wish to inflict upon them the hardships of poverty

---

[24] See footnote 18, *supra*. For a collection of textbook materials showing various types of health conditions in which a pregnancy may be harmful or undesirable see brief of Planned Parenthood Federation, amicus curiae, Appendix B.

[25] See subsection 1, *supra*. For a discussion of the medical reasons for the unreliability of the rhythm method, by an eminent authority, see Rock, *The Rhythm or Periodic Continence Method of Birth Control*, in Calderone (ed.), *Manual of Contraceptive Practice* (1964), pp. 222-8.

[26] Additional data showing that a proper medical solution for these health problems requires the use of extrinsic aids are set forth in the brief of Planned Parenthood Federation, amicus curiae, Appendix B.

and underprivilege, perhaps delinquency and degradation. Young couples may wish to pursue, at least for the time being, careers for which they are in training or in which they are engaged. Or they may wish " an opportunity to adjust, mentally, spiritually and physically, to each other so as to establish a secure and permanent marriage before they become parents." *Trubek* vs. *Ullman*, 147 Conn. at 636, 165 A.2d at 159. Spacing of children, apart from reasons of health, may be a significant consideration for many parents. For all these and other reasons, it may be vital to the well being of parents and children that the parents exercise their right to choose whether and when to have children. Yet the Connecticut statutes preclude the safest and most effective methods of achieving these wholly desirable ends.

From a broader social point of view, likewise, control of conception has become a critical factor in building a better society. Problems of poverty, delinquency, over-crowding and general human progress are closely related to planned limitation of births. But the Connecticut statutes do not permit the scientifically accepted way of approaching these pressing issues.

Furthermore, the methods of birth control allowed under the Connecticut statutes are not only unscientific and unreliable, but are likely to produce harmful effects. The Connecticut Supreme Court of Errors suggests abstinence, or partial abstinence, as a solution to the many critical and poignant problems

of unwanted pregnancy. [27] Even assuming its practicality, the solution is fraught with danger and unhappiness. The evidence is clear that abstinence is frequently damaging both to the individual and to society. Thus Dr. Robert L. Dickinson states the prevailing view:

> "In the close relationship of married life the effect of prolonged abstinence is usually harmful to mental health and balance and to the marriage relationship and a risk to fidelity. As a birth control measure for recommendation by the physician abstinence is negligible." [28]

Otto Fenichel, writing in 1945, mentions as among the causes of sudden aggravations of neuroses "external frustrations or blockings of instinctual satisfactions hitherto obtainable." He says: "any frustration in the realm of adult sexuality increases the intensity of the unconscious infantile sexual longings." He quotes Reich as pointing out "that during sexual excitement typical autonomic nervous reactions occur. In normal sexual intercourse these autonomic cathexes become gradually transformed into genital ones, and find a genital outlet in orgasm. If the orgastic function is disturbed, this change

---

[27] *Tileston* vs. *Ullman*, 129 Conn. at 92, 26 A.2d at 586; *Buxton* vs. *Ullman*, 147 Conn. at 58, 156 A.2d at 514.

The "partial" abstinence required by the rhythm method is substantial. See Janney, *Medical Gynecology* (1950), p. 398: "The rhythm method for the control of conception is sanctioned by groups which oppose other methods of contraception, because it is 'natural.' It is, to be sure, more natural in the physical relationship of intercourse than the condom, the diaphragm or any of the chemical methods. Psychologically, however, it cannot be said to be as natural as these latter methods because, regardless of the inclination of husband and wife, it dictates the time when intercourse shall take place and limits its frequency by about 50% as compared to the frequency reported among normal married couples."

[28] *Techniques of Conception Control* (3d ed. 1950), p. 40.

does not take place. The autonomic system remains overcharged, and this fact produces anxiety." [29]

Karen Horney discusses sexual activity as relieving neurotic tensions: "How well sexual abstinence may be endured varies with the culture and the individual. In the individual it may depend on several psychic and physical factors. It is easy to understand, however, that an individual who needs sexuality as an outlet for the sake of allaying anxiety will be particularly incapable of enduring any abstinence, even of short duration." [30]

And Dr. John Rock has declared:

> "Suppression of the coital urge directed towards his wife is possible for the intelligent considerate husband aware of a good reason why she should not become pregnant. But the urge is still there, and unless, by appropriate and effective taboos, it can be sublimated into a sexual martyrdom of which few Americans, including all colors and creeds, are capable, it will express itself in any one of the innumerable aberrancies of the primate sex function. . . . To demand prolonged continence as the only method of contraception from anyone who is not stoutly bulwarked by the strongest spiritual sanction is to drive that individual to what society has judged criminal, and which, if practiced by any number of those who should prevent pregnancy for shorter or longer periods, for reasons which have been stated, would disrupt our whole moral order." [31]

---

[29] *The Psychoanalytic Theory of Neuroses* (1945), pp. 455, 187-8.

[30] *The Neurotic Personality of Our Time* (1937), pp. 158-9.

[31] *The Scientific Case Against Rigid Legal Restrictions on Medical Birth-Control Advice*, Clinics, April 1943, pp. 1609-10. Numerous other statements by medical authorities, all to the same effect, are set forth in the brief of Planned Parenthood Federation of America, amicus curiae, Appendix B.

The alternative method sanctioned by the Connecticut statutes — withdrawal or *coitus interruptus* — is recognized as even more harmful. The medical view of this method has been summarized by Kroger and Freed:

> "*Coitus Interruptus* is the most widely used and oldest method of contraception. . . . It is usually responsible for a myriad of psychogenic complaints ranging from pruritus vulvae to backache. This method cannot be used by men suffering from premature ejaculation. It is also capable of producing tension in the male and is not too safe a method. The wife, too, will often develop a variety of anxiety reactions because withdrawal separates the genital organs at a time when the emotional climax is at its height, resulting in feelings of severe frustration. It is the worst possible method of birth control." [32]

We are driven to the conclusion, therefore, that the Connecticut statutes, viewed as moral prohibitions upon the use of extrinsic aids to avoid conception, bear no objective relation to promotion of the public welfare, either in terms of protecting any interest of the individual or in terms of strengthening the social structure. They serve no medical purpose, or any other concrete objective related to the material welfare of the community. They are justifiable, if at all, solely as "moral principles", as a matter of religious or ethical faith.

This being so, for the reasons stated previously, the Connecticut statutes cannot satisfy the requirements of due process, at least unless the moral precepts enforced by them represent the predominant moral view of the community. To that issue we now turn.

---

[32] *Psychosomatic Gynecology* (1951), p. 276.

4. The Prohibition Against Using Extrinsic Aids To Avoid Conception, Within The Marriage Status, Does Not Conform To The Predominant View of Morality Within The Community.

Our concern here is with the current views of the community as to the moral basis for prohibiting the use of extrinsic aids in avoiding conception. What the predominant community sentiment may have been in 1879, when the statute was enacted, is not certain. Without doubt changes have taken place during the past 86 years. For reasons already stated (see Section B, *supra*), it is not necessary to uncover that history or to trace the subsequent developments. In this prosecution the statutes must satisfy due process requirements under the facts and conditions of today.

We submit that the overwhelming opinion of today does not regard the use of extrinsic aids by married couples in avoiding conception as morally reprehensible, or at least does not regard the use of such aids by other persons as affording moral grounds for absolute prohibition by government decree. In support of this proposition we call the Court's attention to the following facts, pertaining to (a) general public opinion, (b) medical practice, (c) views of religious groups and leaders, (d) actions by the government itself, and (e) other manifestations of community opinion.

(a) General Public Opinion.

The most recent poll of the American Institute of Public Opinion (the Gallup poll), published in January of this year, reveals that 81 per cent of those questioned thought that "birth control information should be available to anyone who wants it." Only 11 per cent were opposed, and 8 per cent had no opinion.[33]

---

[33] Hartford Courant, Jan. 13, 1965.

A few years ago an extensive study by Freedman, Whelpton and Campbell reported: "Among the fecund couples, 83 per cent had used contraception [all methods] by the time of the interview, and an additional 7 per cent (mostly young couples) plan to begin some time in the future. Only 9 per cent of the fecund couples intend never to regulate family size." And they further found: "The use of appliance methods is very extensive. Approximately 79 per cent of all users have tried such methods." [34]

In view of this broad acceptance of birth control in general, and the widespread use of contraceptive devices in particular, it can scarcely be said that the dominant community opinion holds the adoption of such devices, even for the healthy family, morally objectionable.

(b) Medical Practice.

The very general prescription of contraceptive devices in medical practice has already been pointed out (see subsection 3, *supra*). Again, it is hardly likely that such an overwhelming proportion of a profession, so highly regarded by the public, would advise or employ methods considered morally reprehensible by the prevailing opinion of the community.

(c) Religious Groups And Leaders.

Protestant. Among Protestant groups opinion is well-nigh unanimous that the use of extrinsic aids to avoid conception is morally justified. Indeed some groups hold that proper limitation of families, by medically approved methods, may be considered a religious obligation. We cite only a brief sampling of this opinion:

---

[34] Freedman, Whelpton and Campbell, *Family Planning, Sterility, and Population Growth* (1959), pp. 242, 179.

The Lambeth Conference of Bishops of the Anglican Communion, representing 40,000,000 communicants including members of the Protestant Episcopal Church in the United States, adopted the following resolution in 1958:

> "The Conference believes that the responsibility for deciding upon the number and frequency of children has been laid by God upon the consciences of parents everywhere; that the planning, in such ways as are mutually acceptable to husband and wife in Christian conscience, is a right and important factor in Christian family life and should be the result of positive choice before God." [35]

The General Assembly of the United Presbyterian Church, in 1959, made a similar declaration:

> "The 17th General Assembly
>
> "Approves the principle of voluntary family planning and responsible parenthood,
>
> "Affirms that the proper use of medically approved contraceptives may contribute to the spiritual, emotional and economic welfare of the family,
>
> "Urges the repeal of laws prohibiting the availability of contraceptives and information about them for use within the marriage relationship . . ." [36]

The Council for Christian Social Action, United Church of Christ, comprising the Congregational Christian Church and the Evangelical and Reformed Church, in 1960 stated its position as follows:

> "Responsible family planning is today a clear moral duty. We believe that public law and public institutions should sanction the distribution through authorized channels of reliable information and contraceptive devices.

---

[35] *The Lambeth Conference, 1958, S.P.C.K.* (1958) p. 1:57.

[36] Quoted from Planned Parenthood News, Spring, 1959.

> Laws which forbid doctors, social workers and ministers to provide such information and service are infringements of the rights of free citizens and should be removed from the statute books. Any hospital which receives public funds should permit doctors to provide all services they consider necessary."[37]

And the National Council of Churches of Christ in the United States of America issued the following statement:

> "Most of the Protestant churches hold contraception and periodic continence to be morally right when the motives are right. They believe that couples are free to use the gifts of science for conscientious family limitation, provided the means are mutually acceptable, non-injurious to health, and appropriate to the degree of effectiveness required in the specific situation."[38]

In Connecticut, the Connecticut Conference of Congregational Churches at its 95th annual meeting in October 1962, adopted a resolution approving "'The principle of voluntary family planning' and backed 'proper use of medically approved contraceptives that may contribute to the spiritual, emotional and economic welfare of the family.'"[39]

The Connecticut Council of Churches in December 1962 took like action. Its resolution said: "Christian marriage is a relationship of love and fidelity . . . [and] the sexual life within this relationship is given by God for the benefit of his children, and is neither an ethically neutral aspect of human existence, nor needs to be justified by the procreation of children." It went on to declare that the Connecticut law "restricts members of the medical profession from making known to patients

---

[37] 26 Social Action, No. 8 (April 1960), pp. 24-7.

[38] N.Y. Times, Feb. 24, 1961.

[39] New Haven Journal Courier, Oct. 11, 1962.

information they believe medically beneficial or essential to health; and denies to people access to such information . . . [It] is an invasion of the most intimate aspects of marriage and is a violation of the religious liberty of many citizens who believe it to be morally incumbent upon them to practice planned parenthood."[40]

Many other Protestant organizations, as well as outstanding religious leaders, have expressed the same views. Among the latter are Dr. Harry Emerson Fosdick (Baptist), the late Rev. G. Bromley Oxnam (Methodist), Dr. Norman Vincent Peale, Bishop James A. Pike (Episcopalian), Dr. James H. Robinson (Presbyterian), and Rev. Henry P. Van Dusen (former President of Union Theological Seminary).[41]

Jewish. The position of the Reformed Jews is stated in a resolution passed by the 45th General Assembly of the Union of American Hebrew Congregations in 1959:

> "a. We favor the elimination of all restrictions and prohibitions against the dissemination of birth control information and the rendering of birth control assistance by qualified physicians, clinics, and hospitals.
>
> "b. We favor the wider dissemination of birth control information and medical assistance, both by private groups such as the Planned Parenthood Association, and health agencies of local, state, and the federal government as a vital service to be rendered in the field of public health."[42]

---

[40] New Haven Register, Dec. 10, 1962.

[41] See brief of Planned Parenthood Federation, amicus curiae, Appendix C. This Appendix includes many other statements similar to those quoted above.

[42] *Resolutions Passed by the 45th General Assembly, Union of American Hebrew Congregations* (1959), reprinted in Planned Parenthood Federation, *The Churches Speak Up On Birth Control* (1960).

A similar view is taken by Conservative Jews, speaking through the Rabbinical Assembly:

> "Proper education in contraception and birth control will not destroy, but rather enhance, the spiritual values inherent in the family and will make for the advancement of human happiness and welfare." [43]

A minority Jewish group — the Rabbinical Alliance of America, representing Orthodox Jews — takes an intermediate position, approving the use of extrinsic aids to prevent conception under more limited circumstances:

> "The Rabbinical Alliance feels itself impelled to clarify the viewpoint of Orthodox Judaism on birth control practices, which we feel has been erroneously represented. Orthodox Judaism does not condone any artificial birth control measures by the male spouse, under any circumstances. Only in cases where the health of the female is jeopardized are certain birth control measures allowed and then only through direct consultation between the medical and rabbinic authorities." [44]

Catholic. The Catholic position is that the use of extrinsic aids to prevent conception is morally wrong.[45] But it sanctions the use of the rhythm method under certain circumstances. Thus Pope Pius XII, in 1951, said:

> "We affirm the legitimacy and, at the same time, the limits — in truth very wide — of a regulation of offspring which, unlike so-called 'birth control,' is compatible with the law of God. One may even hope that science will

---

[43] Quoted in Planned Parenthood Federation, *The Churches Speak Up On Birth Control* (1960).

[44] N.Y. Times, Aug. 12, 1958.

[45] See, *e.g.*, Statement of Catholic Bishops of the United States, Nov. 26, 1959, reprinted in U. S. News and World Report, Dec. 7, 1959, p. 122.

succeed in providing this licit [rhythm] method with a sufficiently secure basis." [46]

The circumstances under which members of the Catholic faith may employ the rhythm method to prevent conception were stated in an authoritative Catholic publication, issued under ecclesiastical imprimatur, as follows:

> "Economic burdens, the burden of poverty, of inadequate income, of unemployment which make it impossible for parents to give their children and themselves the food, the clothing, the housing, the education and the recreation they are entitled to as children of God . . ." [47]

It is important to note, however, that the Catholic position does not call for government prohibition of the use of contraceptive devices by persons outside the Catholic faith. Thus Vernon J. Bourke, a distinguished philosopher, has recently written:

> "Are Catholics, living as citizens of a democratic country, justified in seeking government restraint of the dissemination of information on birth-control practices? Before examining this, let us remember that we are talking about a pluralistic society, a society in which there are diverse views on the moral value of birth-control data. . . .
>
> "Remembering that these conflicts arise because of varying notions of what is morally acceptable, I think we may say three things about them. First, each minority group has a right, even within a large pluralistic society, to censor *for its own members* the use of media seriously considered harmful for that group. Secondly, one minority group in a pluralistic society does not have a moral right

---

[46] Catholic Transcript, Nov. 1, 1951, p. 2.

[47] Latz, *The Rhythm of Fertility and Sterility in Women*, (6th ed. 1940), p. 147.

to demand government censoring of the expression of the foregoing sort of information *for members of other groups*, who do not share the same standards. . . ." [48]

And recently an influential Catholic publication stated editorially:

". . . Undoubtedly, many non-Catholics believe that they can make use of contraceptive devices without violating any divine law. Moreover, many such persons feel a positive obligation to prevent conception of offspring for one reason or another. Obviously, then, laws such as the Connecticut law under discussion try to prevent such persons from acting in a way which their consciences either permit or prescribe.

"We would not say that the state never can pass laws such as this, but that it can be done only for the gravest of reasons and when the acts outlawed are manifestly against the common good. Error has no rights, it is true, but persons — or consciences — in error do.

"From these considerations, we feel that a Catholic can justifiably favor repeal of the Connecticut and Massachusetts anticontraceptive laws, or breathe happily if they are declared unconstitutional. . . ." [49]

And Cardinal Cushing of Boston was recently quoted as saying that, should a proposal come before the Massachusetts legislature for repeal of the anti-birth control statute in that

---

[48] *Moral Problems in Censoring*, 40 Marq. L. Rev. 57, 68 (1956). Italics are in the original. See also John Courtney Murray, in John Cogley (ed.) *Religion in America* (1959), pp. 32-3.

[49] Ave Maria, June 16, 1960, p. 16. For a collection of similar Catholic views on the Connecticut statute, see Rock, *The Time Has Come* (1963), Ch. 10.

state, "in no way will I feel it my duty to oppose amendments to the law." [50]

Moreover, there is substantial evidence that Catholic views on birth control are undergoing reconsideration. Thus the Gallup poll, referred to above, revealed that in January 1965 78 percent of Catholics approved making birth control information available, whereas in June 1963 only 53 percent favored that position. [51] And last summer Pope Paul VI appointed a special commission to study the problem of overpopulation and birth control. At that time he said, ". . . the question is being subjected to study, as wide and profound as possible, as grave and honest as it must be on a subject of such importance." [52]

(d) Federal, State And Local Government.

For many years the Federal Government has acted in a manner wholly inconsistent with any premise that the use of extrinsic aids to avoid conception is morally objectionable. Thus contraceptives have long been made available to members of the armed forces.[53] During World War II the War Production Board, whose function it was to allocate scarce commodities, promulgated regulations providing sufficient materials for

---

[50] Dorsey, *Changing Attitudes Toward the Massachusetts Birth-Control Law*, 271 New England Journal of Medicine 823, 826 (1964).

[51] Hartford Courant, Jan. 13, 1965.

[52] New York Times, June 24, 1964. For further evidence of reconsideration of the Catholic position, see the series of four articles in the New York Times, Aug. 5, 6, 7 and 8, 1963. See also the petition to Pope Paul VI and the Ecumenical Council, by 182 prominent Catholic laymen of 12 learned professions, asking for a "far-reaching reappraisal" of the Church's teachings on birth control. N.Y. Times, Oct. 20, 1964. And see Rock, *The Time Has Come* (1963).

[53] See, *e.g.*, Freedman, Whelpton and Campbell, *Family Planning, Sterility, and Population Growth* (1959), p. 177.

the manufacture of contraceptives for men and women at 100 per cent of the 1940-1941 production level.[54] Federally sponsored hospitals, available to personnel of the armed services, provide contraceptive advice and care.[55] Recently the Department of Health, Education and Welfare announced that "Information on the prevention of pregnancy similar to that provided in the normal course of a doctor-patient relationship may be provided Indian beneficiaries of the Public Health Service."[56] In May of last year Federal funds were provided by Congress for a program of full birth control service in the District of Columbia, available to all mothers delivered of a child at the District of Columbia General Hospital and to women qualifying for welfare assistance.[57] And in January of this year the Office of Economic Opportunity made a grant of funds to Corpus Christi, Texas, earmarked to provide birth control information and mobile birth control clinics.[58]

The pattern in State and local governments is the same. As already noted, the prescription and use of contraceptive devices, at least under some circumstances, is lawful in 48 of the 50 States.[59] More significant for the issue here, in many States

---

[54] War Production Board, Supplementary Order No. M-15-b, List C, issued January 24, 1942.

[55] See, *e.g.*, letter in Army Times, Nov. 15, 1961.

[56] H.E.W., Public Health Service, Division of Indian Health, Circular No. 6 S-2. dated Jan. 21, 1963. See also H.E.W., *A Survey of Research on Reproduction Related to Birth and Population Control*, Public Health Service Publication No. 1066 (1963).

[57] Washington Post, Mar. 18, 1964; District of Columbia Government, Department of Public Health, *Birth Control Program: Policies and Procedures Manual* (May 1, 1964). In the first months of the program well over 1200 women received such care.

[58] N.Y. Times, Jan. 6, 1964. The Times reports that at least two other cities — Milwaukee and Washington — are seeking similar grants.

[59] See footnote 23, *supra*.

and localities the government operates positive programs to make contraceptive devices available to persons desiring to use them. According to a survey by the American Public Health Association, health departments in 27 States now offer some form of family planning services either through clinics of their own or through referrals to other agencies. These States are Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Maryland, Michigan, Mississippi, Missouri, Nebraska, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, Wisconsin. [60]

Many local governments follow the same practice. In addition to Corpus Christi (*supra*), in New York City, under a Federal grant totalling $1,462,718, five clinics operated for the city by cooperating hospitals have provided birth control advice and materials since October 1, 1964. [61] Health authorities in Dallas County, Texas, conduct free birth control clinics and send mobile units to dispense advice and contraceptives throughout the county. [62] In Dade County, Florida, the Public Health Department furnishes free contraceptive pills to welfare recipients. [63] The city authorities of Pasadena, California, distribute birth control information and supplies in low-income

---

[60] American Public Health Association, *Report of the Committee on Family and Population Planning* (1964). The Children's Bureau of the Department of Health, Education and Welfare now permits State health departments to include funds for family planning in the Federal grants made for maternity and infant care programs. N.Y. Times, Jan. 22, 1965.

[61] N.Y. Times, Jan. 7, 1965. Two of the hospitals are Catholic and limit their techniques to the rhythm method. Other clinics are planned. Each clinic can handle about 1000 cases a year. *Ibid.*

[62] Edinburgh Valley Review, July 17, 1963.

[63] Miami Florida Herald, Aug. 24, 1963.

sections. [64] Many other local health agencies in California, and five counties in Colorado, have established birth control programs. [65]

(e) Other Manifestations Of Community Opinion.

It is hardly necessary to accumulate further data on this point. The following facts may, however, be noted:

The White House Conference on Children and Youth in 1960 adopted the following resolution:

> "We recommend that planning for the size of families is desirable in order to relieve the deprivation of children. Thus, facilities and programs on a local public or private basis should be available to married couples to provide medical advice and services for child spacing. These should be consistent with the creed and mores of the families served." [66]

The American Assembly, at its meeting in Harriman, New York, in 1963 recommended:

> "Assumption of responsibility by the federal, state and local governments for making available information concerning the regulation of fertility and providing services to needy mothers compatible with the religious and ethical beliefs of the individual recipients." [67]

In August 1964 the Republican Citizens Committee made public its Critical Issues Paper No. 12, recommending, *inter alia*:

> "That the United States Public Health Service provide appropriate leadership and assistance to state and local

---

[64] Washington Post, Mar. 10, 1963.

[65] Planned Parenthood Federation, *Current Family Planning Programs and Developments in Tax Supported Agencies* (1959).

[66] N.Y. Times, Jan. 24, 1960.

[67] N.Y. Times, May 6, 1963.

health departments in offering help to disadvantaged citizens in the regulation of birth by means which accord with their religious beliefs and individual preferences." [68]

The 1964 Convention of the Young Women's Christian Association adopted a resolution recommending support for the development of appropriate channels for the widest possible sharing of knowledge so that individuals and governments are enabled to obtain family planning information of such variety as to serve those of different creeds, mores and in different circumstances." [69]

Some 222 Planned Parenthood Federation birth control clinics are operating throughout the country.[70]

Our two living former Presidents — President Truman and President Eisenhower — are serving as Co-Chairmen of the Honorary Sponsors Council of the Planned Parenthood Federation's 1965 Nationwide Campaign.[71]

We submit the evidence is overwhelming that, at least as of 1965, the use of extrinsic aids to avoid conception, within the marital relation, cannot be held contrary to the prevailing morality of the community. The acceptance of such practices by general public opinion, by virtually the entire medical profession, by the bulk of religious groups, and by leading organizations and individuals, and especially the actual employment of such devices on a widespread scale by all levels of government itself — render any other conclusion impossible.

---

[68] Critical Issues Council, *Resources and the Future: Population* (Aug. 1964), p. 5.

[69] Adopted at 23d National Convention, Cleveland, Ohio, Apr. 24, 1964 (mimeo. release).

[70] For a listing of affiliates, see Planned Parenthood Federation, *Planned Parenthood Affiliates* (June 1964).

[71] Planned Parenthood News, Fall 1964, p. 1.

Since there is no objective relation between the prohibition of the Connecticut statutes and any material public welfare; since, in other words, the Connecticut statutes rest solely on moral principles and are purely matters of religious or ethical faith; and since these principles do not reflect the dominant moral opinion of the community, the attempt by Connecticut to enforce them against the whole community by criminal statute cannot stand under the due process clause.

5. Any Possible Beneficial Aspects Of The Statute Are So Totally Outweighed By Their Cruel And Drastic Infraction Of Individual Rights, Their Inconsistencies And Irrationalities In Actual Operation, And Their Other Patent Defects, That They Must Be Held Arbitrary And Capricious And Hence In Violation Of Due Process Of Law.

Our final point under the due process clause is that, even if the statues were found to satisfy the due process requirements just discussed, they must still pass the basic test of being not arbitrary or capricious. This involves a general weighing of benefits against detriments. We realize that in this balancing process the burden is on appellants to show that the statutes are arbitrary. For reasons already mentioned, however, the burden is lighter in this case because fundamental rights of personal liberty are at stake, and hence the Court has a greater obligation to scrutinize the legislative judgment with skepticism and care. Moreover, there is here no clear-cut expression of statutory purpose which can serve as any solid foundation for a presumption in favor of the legislative judgment. In any event we believe the facts demonstrate that these Connecticut statutes cut so deeply into so many facets of individual liberty, and are so totally irrational in their social impact, that the burden of proving them arbitrary and capricious, even by the most exacting standard, is fully met.

The benefits accruing to the State of Connecticut from the statutes in question, being derived from governmentally enforced adherence to moral principles, and not being subject to objective measurement, are difficult to weigh in a due process balance. Our main attention, then, is focused on the other side of the scales.

Some of the detrimental effects of the statutes have already been pointed out. Others are apparent. We confine our treatment to a summary of the principal points.

(a) The Choice Between Ill-Health Or Death, And Abstinence.

For many women, as we have seen, pregnancy means serious illness or death. The methods of avoiding pregnancy barred by the Connecticut statutes, while not yet faultless, are in the opinion of the medical profession, the safest, the most effective, and the best, and provide a satisfactory solution to the problem. The methods allowed by the Connecticut statutes are ineffective and dangerous, and do not afford a satisfactory solution, medical or otherwise. The women suffering from such conditions are therefore placed in the position of risking serious injury or loss of life or, through abstinence, sacrificing the right to enjoy one of the most cherished aspects of the marriage relationship.

This cruel dilemma enforced by the Connecticut statutes cannot be justified. The right to protect one's own health and life is obviously fundamental. The power of the state to prohibit any person from taking medical measures to safeguard life and health, if it exists at all, is surely very narrowly circumscribed. It can be exercised only in the most extreme situations and upon the plainest showing of social necessity. Apart from the power to conscript men of arms under the war power, it is difficult to envisage the circumstances where such governmental measures could conceivably be warranted. Cer-

tainly no instances come to mind where the state has prohibited an individual from preserving life and health through the use of medically accepted methods not harmful in themselves.

It is no answer to say that the individual has the alternative of abstinence. The conjugal right is itself fundamental, one of the most precious rights with which man is endowed. To condition the enjoyment of one elemental right upon the sacrifice of another, is not a choice the state may constitutionally impose. Whichever side of the coin one looks at, the lack of power in the state to deny liberty in this way remains.[72]

We know of no case where this Court has dealt with these precise questions. But in *Jacobson* vs. *Massachusetts*, 197 U.S. 11 (1905), this Court did at one point approach the problem. That case involved a Massachusetts statute providing for compulsory vaccination. The Court upheld the statute. In the course of his opinion, Justice Harlan addressed himself to the argument that there might be situations where it is "apparent or can be shown with reasonable certainty that [a person] is not at the time a fit subject of vaccination or that vaccination, by reason of his then condition, would seriously impair his health or probably cause his death." Justice Harlan was careful to make clear:

> "We are not to be understood as holding that the statute was intended to be applied to such a case, or, if it was so intended, that the judiciary would not be competent to interfere and protect the health and life of the individual concerned." 197 U.S. at 39.

---

[72] A third possibility, open in some circumstances, is sterilization or abortion. But these solutions, even if available, do not eliminate the dilemma but simply present it in a different form. See subsection g, *infra*.

The situation supposed by Justice Harlan, on a vastly augmented scale, is here presented by Connecticut's interpretation of its anti-contraceptive statutes. And this Court is now asked to "protect the health and life" of the many individuals concerned.

(b) Other Harms To The Individual.

Even where actual life or grave and immediate impairment of health is not at stake, the Connecticut statutes impose serious deprivations upon many married couples. The fear of unwanted pregnancy is emotionally disturbing; indeed, "it can produce the effect of a direct inhibition, particularly if it is obsessively exaggerated, as is often the case." [73] The spacing of children is important to the health of the mother; in the Guttmacher poll of 3,381 physicians, well over two-thirds fixed the desirable interval between the termination of one pregnancy and the beginning of the next at from 10 to 24 months.[74] The bearing of defective children is tragedy for all concerned, — parents, children and society. Many other aspects of health and happiness turn on effective control of conception. [75]

Under the Connecticut statutes these problems can be solved only at the price of abstinence. Yet abstinence itself leads to unhappiness, tensions between husband and wife, extra-marital relations, and divorce.[76] Again the statutes impose an intolerable choice which the state has no power to demand.

---

[73] 2 Deutsch, *The Psychology of Women* (1945), p. 93.

[74] Guttmacher, *Conception Control and the Medical Profession*, 12 Human Fertiltiy 1, 6 (1947).

[75] See subsection 3, *supra*, and brief of Planned Parenthood Federation, amicus curiae, Appendix B.

[76] See subsection 3, *supra*, and brief of Planned Parenthood Federation, amicus curiae, Appendix B.

(c) *The Right To Make Decisions On The Most Personal And Important Questions Of Married Life.*

By forbidding the safest and most effective methods of avoiding conception, and permitting only the most harmful and unreliable ones, the statutes make it hazardous or impossible for a married couple to make their own decisions on the most crucial aspects of their life together. The State of Connecticut is stepping in, through its criminal law, to prevent them from deciding whether to have children, how many to have, at what time to have them. These are decisive questions which affect not only life and health but relations between spouses, careers of husband and wife, the economic status of the family, the method and manner in which children are to be raised, and a host of other things. The planning of children is essential to the planning of one's entire way of life.

Except for the most imperative of reasons, the state has no right, in a free society, to arrogate to itself the decision on these vital matters. As this Court declared in *Meyer* vs. *Nebraska*, "the right of the individual to . . . marry, establish a home and bring up children" is a fundamental "liberty" assured by our Constitution. 262 U.S. at 399.

(d) *The Unwanted Child.*

We have dealt up to now mostly with the impact of the statutes upon the parents. But the children produced by virtue of the Connecticut statutes must be considered too. The plight of the unwanted child, and its social consequences, have been well stated by Dr. Karl Menninger:

> "Far more important than the dramatic examples in which the hostility of a mother ruins the life of an unwanted child, are the more general effects of repressed maternal hatred. Where one child reacts to this with an acute mental illness, dozens of children react to it in more subtle

ways by developing self-protective barriers against the inner perception of being unwanted. This may show itself in a determined campaign or in a provocative program of attracting attention by offensive behavior and even criminal acts. Still more seriously it may show itself as a constant fear of other people or as a bitter prejudice against individuals or groups through deep-seated, easily evoked hatred for them. The rage of the southern poor white against the Negro suspected of some dereliction is referable to the hate he feels inwardly at having been himself, like the Negro, unwanted. The same is perhaps true in the case of Germans and Jews and in many other situations which give opportunity for the expression of hatred in the denial of the feeling of being rejected. The importance of this factor in the psychology of war is even greater, in my opinion, than the economic factor arising from the increase of population. This is why I say that from the purely scientific point of view, planned parenthood is an essential element in any program for increased mental health and for human peace and happiness. The unwanted child becomes the undesirable citizen, the willing cannon-fodder for wars of hate and prejudice. . . ." [77]

We may assume that the Connecticut legislature, when it passed the Connecticut law, did not take into account these factors. But in any current appraisal of the law they weigh heavily against a finding of reasonableness.

---

[77] *Love Against Hate* (1942), p. 224. See also Coghill, *Emotional Maladjustments from Unplanned Parenthood*, 68 Virginia Medical Monthly 682 (1941); Jenkins, *The Significance of Maternal Rejection of Pregnancy for the Future Development of the Child*, in Rosen, *Therapeutic Abortion* (1954), p. 269.

(e) The Invasion Of Privacy.

The statutes undertake, on a pervasive scale, to regulate the most intimate relations of husband and wife. We discuss these features of the law at greater length in Point III. At this point we simply note, as one of the major costs that must be weighed against any possible gain, the unparalleled invasion of privacy which the law and its enforcement would entail.

(f) Abridgment Of The Right To Practice Medicine In Accordance With Accepted Scientific Principles.

As we have stressed throughout this brief, the Connecticut statutes run squarely counter to all accepted medical opinion and practice. They prohibit physicians from employing methods dictated by scientific knowledge. They require the use of practices which students and practitioners of medicine virtually unanimously condemn as unscientific and harmful; indeed use of such methods in other States might well in some cases render a physician guilty of malpractice. They hamper further inquiry and foreclose experimentation in new techniques for the solution of human and social problems. At the time the statutes were enacted the science of medicine had not reached the stage where the legislature could be aware of all these considerations, or at least of their full impact.[78] But they cannot be ignored now.

So far as the Connecticut statutes abridge freedom of expression, the power of the State is non-existent, or at best minimal. These issues are discussed in Point IV. We deal here with those aspects of the statutes which, restricting conduct that falls outside the area of expression and into the area of action, are governed by due process rather than First Amendment principles. We assume that the conduct of appellants in

---

[78] See Himes, *Medical History of Contraception* (1963), Part Five.

examining patients, prescribing drugs or i[illegible]ruments to avoid conception, and supplying those materials, is properly classified as action, subject only to due process protection.

Analysis of the problem quickly reveals, however, that the area with which we are concerned is closely analogous to the area of freedom of expression.[79] The pursuit of scientific knowledge frequently leads into the realms of experimentation or other conduct that may involve action. The line of division is hard to draw. Moreover, the values sought by the individual in undertaking scientific inquiry or practicing a scientific profession — fulfillment of the individual potentiality and achievement of a rewarding life — can often be attained only by pursuing one's endeavors into the field of scientific or social action. Such is the case here, both as to Dr. Buxton and Mrs. Griswold. These are values highly regarded by our society.

The same is true of the social values here at stake. Just as in the case of freedom of expression, society is vitally concerned with facilitating the process of orderly social change. In order to survive in the modern world it must, while maintaining the necessary stability, adapt itself to the revolutionary changes now taking place, at the peril of abrupt and catastrophic change. But social change requires more than the right of speech. It often requires a right of action. And such action is of no greater importance than in the field of scientific progress with which we are here dealing.

Finally, the area of action involved in this case is very similar to the area of expression for another reason. A basic rationale for not abridging freedom of expression is that expres-

---

[79] For discussion of the factors considered in the following paragraphs, as they apply to the area of freedom of expression, see Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877 (1963).

sion, in a broad sense, in itself results in no immediate or irreparable harm to any person. Society can therefore properly limit its controls to the ensuing action. The same characteristic is found in much conduct falling within the area classified as action, including the conduct of appellants and their patients in this case. There is no suggestion here that such action results in any immediate injury to any other person. The restrictions imposed by the State in this case, therefore, serve no social purpose. The power of the State may properly be limited to the prohibition of specific conduct where actual injury appears.

For all these reasons, we submit, the Court should weigh Connecticut's invasion of the right to practice medicine according to scientific principles by the strictest of standards, similar to those applied in free speech cases. This was the approach of the Court when the State of Nebraska attempted to forbid the teaching of German (*Meyer* vs. *Nebraska*, 262 U.S. 390), and when the State of Oregon sought to prevent the operation of private schools (*Pierce* vs. *Society of Sisters*, 268 U.S. 510). Applying these standards the Connecticut statutes must be judged arbitrary and capricious. They are the relic of another age, like the laws against the teaching of evolution, and bear no reasonable relation to modern times or needs.

(g) Irrationality In Relation To Other Laws.

Judged by the policy expressed in other Connecticut legislation, the restrictions imposed by the statutes involved in this case are wholly irrational:

Under the Connecticut abortion law a physician may abort a patient when "necessary to preserve her life or that of her unborn child." Conn. Gen. Stats., Sec. 53-29. So too, a woman may "produce upon herself miscarriage or abortion" where necessary for these same reasons. Conn. Gen. Stats., Sec. 53-30.

But under the anti-contraceptive statutes they are forbidden to take effective measures to prevent the conception, even though they know a later abortion will be necessary.

Under other Connecticut laws sterilization — an operation in which an "instrument" is used "for the purpose of preventing conception" — may be performed upon inmates of the State Prison or of State mental hospitals in certain medically prescribed situations, and also may be performed in other situations where that operation "is a medical necessity." Conn. Gen. Stats., Sec. 17-19 and 53-33. But less permanent measures for achieving the same purpose are not allowed.

Under the statutes applied to these appellants, contraceptives can be prescribed, sold or used for the prevention of disease (see Statement of the Case, *supra*), but not for the protection of life.

None of these distinctions makes sense, either in moral terms or in practical terms. If moral principles require that never, under any circumstances, can life be thwarted by extrinsic aids to avoid conception, how can the State justify the more serious denial of life by abortion or sterilization? And how can it justify the same thwarting of life in order to prevent the less serious results of venereal disease? The statutes challenged here are not the outcome of any exercise of rational judgment. They are, by the most elementary meaning, arbitrary and capricious.

(*b*) *Irrationalities In Operation.*

The Connecticut statutes operate in an irrational manner in at least four important respects:

(1) The statutes, so far as enforced, would always be applicable to married persons and seldom applicable to unmarried persons engaging in sexual relations. This paradox arises from the fact that, as just stated, it is not unlawful for persons

to use otherwise forbidden devices for the purpose of preventing disease although by so doing they also prevent conception. The Connecticut law requires a serological test and a certification that the parties are free from venereal disease before a marriage certificate can be obtained. Conn. Gen. Stats., Sec. 46-5(b). When married, presumably the parties are healthy in this respect and, if they are faithful to each other, will have no occasion to use contraceptives for the prevention of disease. Persons engaged in extra-marital intercourse cannot be expected to have the assurance of a physician's certificate that they will not risk infection. Consequently they may legally employ the devices forbidden to married couples.

(2) The statutes operate to discriminate against low-income groups. As this Court noted in *Poe* vs. *Ullman*, the statutes are a dead letter as applied to private individuals or private physicians. They are enforced, and effectively, against birth control clinics; no such clinics have operated in Connecticut since the *Nelson* decision in 1940. They would presumably also be enforced against quasi-public institutions such as hospitals if birth control information or materials were freely made available by them to the general public. The result is that those persons who can afford to go outside the State, or to consult a private physician (at least after *Poe* vs. *Ullman*), can obtain and use contraceptive devices. Those who cannot afford this course of action, or who do not have access to the necessary information through lack of education or otherwise, receive the brunt of the law's impact. The application of the statute is thus wholly arbitrary.

(3) Since the statutes are not generally enforced or enforceable, they can only be applied to individuals in an arbitrary fashion. No rational program for enforcement has been instituted or could be. The law is thus subject to the unfettered discretion of the prosecuting officials. It is open to use for

blackmail, or for paying off a grudge, or for harassment of an unpopular citizen. It is not capable of rational administration. See *Davis* vs. *Schnell*, 81 F. Supp. 872 (S.D. Ala., 1949), *aff'd* 336 U.S. 933 (1949); Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 Yale L.J. 543 (1960).

(4) The statutes tend to produce an increase in the number of illegal abortions. While the evidence is not conclusive, there are many authorities who find a direct relation between the availability of contraceptive services and the criminal abortion rate.[50] It stands to reason that the Connecticut statutes, which cut off all public information and services on contraception, operate to accentuate this acute social problem. The law thus promotes the very kind of immorality it ostensibly is designed to limit.

(i) The Problem Of Overpopulation.

Population expansion poses a momentous problem for this country and the world today. The issue must be ranked as equal in importance to the questions of disarmament and peace, automation, poverty and civil rights.[51] Indeed population control is a part, and a significant part, of each of these burning problems.

---

[50] See, *e.g.*, Kleegman, *Planned Parenthood: Its Influence on Public Health and Family Welfare*, in Rosen, *Therapeutic Abortion* (1954), pp. 254-5; Calderone, *Abortion in the United States* (1958), pp. 111-3, 182; Whelpton, *The Abortion Problem*, in Williams, *The Sanctity of Life and the Criminal Law* (1957), p. 211.

[51] Note the statement of the National Academy of Sciences: "Other than the search for lasting peace, no problem is more urgent." *The Growth of World Population*, Publication No. 1091 of the National Academy of Sciences, National Research Council (Wash., D. C., 1963), p. 2.

We will not attempt to present in this brief the facts pertaining to the "population explosion." It is now fully apparent that the public welfare of the world, this nation, and all its constituent parts, requires immediate consideration of measures to plan and limit population growth. And any such program must obviously rely upon the use of scientific methods for preventing conception.

The Federal Government has recognized the problem and is actively seeking a solution. In December of 1962 United States policy was officially stated by Richard H. Gardner, Deputy Assistant Secretary of State for International Organization Affairs, speaking to the United Nations:

> "In the opinion of my Government progress toward (the) high aims of the United Nations Charter cannot be measured merely by increases in gross national product. The object of economic development is the welfare and dignity of the individual human beings.
>
> "If the condition of the individual, and not gross statistics, is to be the measure of our progress, then it is absolutely essential that we be concerned with population trends .... So long as we are concerned with the quality of life we have no choice but to be concerned with the quantity of life.
>
> "We believe these statements are true not just for some but for all nations ....
>
> "Within the United States our local, state and federal governments are all devoting attention to population trends as part of their planning for the improvement of individual welfare." [82]

---

[82] U.S. State Department Bulletin, Vol. XLVIII, No. 1228, Jan. 7, 1963.

President Kennedy supported these developments. Thus in a speech on June 5, 1963, calling for solution of the problem of hunger in the world, he made clear the interest of this country when he said, "Population increases have become a matter of serious concern."[83]

And President Johnson, in a significant and much-noted passage in his State of the Union Address this year, emphasized that additional action was necessary and would be taken:

> "I will seek new ways to use our knowledge to help deal with the explosion in world population and the growing scarcity of world resources."[84]

We are confronted then with an acute world-wide problem that is pressing for immediate solution. That solution must involve, as a major element, the voluntary use of contraceptive devices to limit the number of children born. Viewed in this context, in the light of world opinion and world needs, the contrary judgment of the Connecticut statutes, left-overs from a by-gone era, can have little standing.

(j) The Accumulation Of Factors,

Possibly no one of the considerations set forth above would persuade the Court to hold the Connecticut statutes arbitrary and capricious. But the accumulated impact of all of them makes that conclusion irresistible.

---

[83] N.Y. Times, June 5, 1963.

[84] 111 Cong. Rec. 27 (daily ed., Jan. 4, 1965).

G. The Statutes, Considered As An Effort To Protect Public Morals By Discouraging Sexual Intercourse Outside The Marital Relation, Are Not Reasonably Designed To Achieve That End And Impose Restrictions On Fundamental Liberties Far Beyond What Is Necessary To Accomplish Such A Purpose.

We reach finally the last objective which has been advanced as a constitutional basis of the Connecticut statutes. The Supreme Court of Errors said in *State* vs. *Nelson* that "it is not for us to say that the Legislature might not reasonably hold . . . that use of contraceptives, and assistance therein or tending thereto, would be injurious to public morals; indeed, it is not precluded from considering that not all married people are immune from temptation or inclination to extra-marital indulgence, as to which risk of illegitimate pregnancy is a recognized deterrent deemed desirable in the interests of morality." 126 Conn. at 424, 11 A.2d at 861. And twice it has quoted the Massachusetts decision in *Commonwealth* vs. *Gardner*, 300 Mass. 372, 15 N.E.2d 222 (1938), that the use of contraceptives would "promote sexual immorality." 126 Conn. at 421, 11 A.2d at 860; *Tileston* vs. *Ullman*, 129 Conn. at 90, 26 A.2d at 585. We take it that the Supreme Court of Errors is saying that the statutes are constitutionally justified as measures to discourage extra-marital sexual relations of both married and unmarried persons.

Viewed in this way, the Connecticut statutes are designed to enforce moral principles. But in this situation the moral purpose may be objectively related to material public welfare and cannot be said to run clearly counter to the current moral standards of the community. Hence the objections founded on these grounds, as discussed in Section F, *supra*, are not applicable here.

Nevertheless, the statutes, scrutinized in light of the purpose now under consideration, violate due process in two major respects: (1) the means employed are not substantially and reasonably related to the objective sought; and (2) the statutes impose drastic restrictions upon individual rights far beyond what is necessary to achieve the stated purpose.

1. The Relation Of Means To End.

The means employed by the Connecticut statutes, ostensibly to discourage extra-marital relations, are to prohibit the *use* of contraceptive devices. The statutes do not regulate the sale, prescription, display, advertising or any other matters. Being directed solely at use, the statutes could accomplish their objective by simply prohibiting the use of such devices in extra-marital relations. Prohibition of use by married couples — the basis of this prosecution — has no relation whatever to the claimed objective. The situation is the same as if, in order to discourage adultery or fornication, Connecticut prohibited all sexual relations among its citizens.

Furthermore, in actual operation the statutes are enforceable *least of all* against those who use contraceptives in extra-marital relations. As already stated, contraceptive devices can be prescribed, sold and used in Connecticut for prevention of disease. And persons engaging in sexual relations outside the marriage status have a far better basis than married couples for asserting that the device was used for the prevention of disease. So too, those who engage in the sale and distribution of such items cannot be subjected to criminal penalties as accessories, since the State could not in any event prove that the person making the sale intended that the device be used for the prohibited purpose, prevention of conception, and not for the permissible purpose, the prevention of disease. With respect to the forbidden use of the articles in extra-marital relations, therefore, the task of the prosecutor is virtually impossible.

And, in fact, contraceptive devices are widely available for sale and use in Connecticut. The statutes, as this Court held in *Poe* vs. *Ullman*, have no effect upon individual users. Their only effect is on birth control clinics, whose services were not available to the unmarried.

In short, there is no substantial relation, in theory or in practice, between prohibiting the use of contraceptives within the marital relation and the discouragement of sexual relations outside the marriage bond.

2. The Breadth Of The Statutes.

Even if some relation were shown between means and end, the statutes are not narrowly drafted to accomplish their purpose, but sweep within their ambit much other conduct which is not appropriate to their purpose and which the State may not control. The manner in which the statutes infringe upon protected liberties has been discussed in Section F, *supra*, and need not be repeated here. The right to life and health, the right to make the fundamental decisions of married life, the right to privacy, the right to practice one's profession, are all drastically curtailed or denied. And the excessive breadth of the statutes is responsible for many of the inconsistencies and irrationalities that have been pointed out.

Nor is it necessary that the statutes sweep so broadly to achieve this aim of discouraging extra-marital relations. Alternatives are available. Connecticut has statutes against adultery, fornication and lascivious carriage. Conn. Gen. Stats., Sec. 53-218 and 53-219. Some regulation of sale or prescription of contraceptive devices, designed to keep them out of the hands of those seeking illicit sexual relations, is possible. Other States deal with the problem this way.

This case falls squarely within the doctrine of those decisions which have struck down legislation that was not narrowly

drafted to meet the specific evil. *Wieman* vs. *Updegraff*, 344 U.S. 183 (1952); *Shelton* vs. *Tucker*, 364 U.S. 479 (1960); *Aptheker* vs. *Secretary of State*, 378 U.S. 500 (1964). What the Court said in *Butler* vs. *Michigan*, 352 U.S. 380 (1957) — a strikingly similar case — is fully applicable here:

> "The State insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely, this is to burn the house to roast the pig." 352 U.S. at 383.

H. Conclusion

Whatever we take to be the objective of the Connecticut statutes, they do not meet the standards of due process. Seldom has the Court had before it legislation for which the purposes were so obscure or the alleged benefits so ill-founded. And probably never has the Court had before it legislation which touched so drastically and so arbitrarily upon so many fundamental rights of the citizen. Fortunately the law is aberrational. Only Connecticut, and in part Massachusetts, have such legislation. We submit it cannot stand the test of due process of law.

POINT III.

The Connecticut Anti-Contraceptive Statutes Violate Due Process Of Law In That They Constitute An Unwarranted Invasion Of Privacy.

The concept of limited government has always included the idea that governmental powers stopped short of certain intrusions into the personal and intimate life of the citizen. This is indeed one of the basic distinctions between absolute and limited government. Ultimate and pervasive control of the individual, in all aspects of his life, is the hallmark of the absolute state. A system of limited government safeguards a private sector, which belongs to the individual, and firmly distinguishes it from the public sector, which the state can control.

Protection of this private sector — protection in other words of the dignity and integrity of the individual — has become increasingly important as modern society has developed. All the forces of a technological age — industrialization, urbanization, organization — operate to narrow the area of privacy and facilitate intrusions into it. In modern terms, the capacity to maintain and support this enclave of private life marks the difference between a democratic and a totalitarian society.

In our constitutional system, the principle of safeguarding the private sector of the citizen's life has always been a vital element. The Constitution nowhere refers to a right of privacy in express terms. But various provisions of the Constitution embody separate aspects of it. And the demands of modern life require that the composite of these specific protections be accorded the status of a recognized constitutional right.

The protected area of privacy is marked out in part by the First Amendment. Freedom of religion is a key element in any

system for maintaining the independence and the dignity of the individual. So also is the right to hold beliefs and opinions without coercion from the state. This is the meaning of Justice Jackson's famous declaration that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Board of Education* vs. *Barnette*, 319 U.S. 624, 642 (1943).

Another constitutional provision which recognizes the right of privacy is the Third Amendment. This forbids that any soldier "shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law." At the time the Constitution was framed, this invasion of privacy was one of the chief dangers threatening the personal life of the citizen.

Undoubtedly the most significant constitutional provision directed toward protection of privacy is the Fourth Amendment. This expressly guarantees the "right of the people to be secure in their persons, houses, papers, and effects." The protection is phrased in terms of search and seizure, and arrest, because those were the chief manifestations of invasion of privacy under conditions existing when the Bill of Rights was adopted. But the concept which the Fourth Amendment undertakes to incorporate in our system of individual rights is certainly a much broader one. It embodies the ancient notion that "a man's home is his castle." And applied to conditions of modern life, as Justice Bradley declared in *Boyd* vs. *United States*:

> "The principles laid down in this opinion [*Entick* vs. *Carrington*] affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employés of the sanctity of a man's

home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence, — it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment," 116 U.S. 616, 630 (1855).

Another classic expression of this view that the Fourth Amendment incorporates a comprehensive protection of the right to privacy is that of Justice Brandeis, dissenting in *Olmstead* vs. *United States*:

> "The protection guaranteed by the [Fourth and Fifth] Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. . . ." 277 U.S. 438, 478 (1928).

And only recently this Court took occasion to refer to the "right to privacy, no less important than any other right care-

fully and particularly reserved to the people." *Mapp* vs. *Ohio*, 367 U.S. 643, 656 (1961). [1]

Closely related to the Fourth Amendment is the Fifth Amendment. This established by constitutional mandate an accusatorial rather than an inquisitorial system of criminal prosecution. And in its broader reaches it protects the conscience and dignity of the individual from all outside forces, whether the government or the general public. [2]

In short, just as the First Amendment, though referring concretely to speech, press, assembly and petition, protects a general right of expression and association (see *N.A.A.C.P.* vs. *Button*, 371 U.S. 415 (1963)), so the Third, Fourth and Fifth Amendments, while specifically mentioning only the major forms of invading privacy which were paramount at the time, embody a general principle which protects the private sector of life against "every unjustifiable intrusion by the Government."

It can be argued, further, that the right of privacy is protected by the Ninth Amendment. The framers there provided that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Professor Redlich in an important article has pointed out that in interpreting both the Ninth and Tenth Amendments, "the textual standard should be the entire Constitution." "The original Constitution," he wrote, "and its amendments project through the ages the image of a free and open society. The Ninth and Tenth Amendments recognized — at the very outset of our national experience — that is was

---

[1] See also *Monroe* vs. *Pape*, 365 U.S. 167 (1961). For a discussion of the significance of the Fourth Amendment cases, see Beaney, *The Constitutional Right to Privacy in the Supreme Court*, 1962 Sup. Ct. Rev. 212.

[2] See, *e.g.*, Griswold, *The Right to be Let Alone*, 55 N.W.U.L. Rev. 216 (1960).

impossible to fill in every detail of this image. For that reason certain rights were reserved to the people. The language and history of the two amendments indicate that the rights reserved were to be of a nature comparable to the rights enumerated." Redlich, *Are There "Certain Rights *** Retained by the People"?* 37 N.Y.U.L. Rev. 787, 810 (1962).

The Ninth Amendment was certainly intended to protect some rights of the people. As Dean Griswold has said, " 'The right to be let alone' is the underlying theme of the Bill of Rights." [3] It is submitted that the interest of married spouses in the sanctity and privacy of their marital relations, involves precisely the kind of right which the Ninth Amendment was intended to secure.

Finally, protection against unwarranted intrusion by the government into private affairs is incorporated in the "liberty" guaranteed by the due process clause of the Fourteenth Amendment. That provision, as this Court has ruled, applies to the States the guarantees embodied in the First, Fourth and Fifth Amendments. *Gitlow* vs. *New York*, 268 U.S. 652 (1925); *Mapp* vs. *Ohio*, 367 U.S. 643 (1961); *Malloy* vs. *Hogan*, 378 U.S. 1 (1964). Further, the Court has specifically held that the due process clause of the Fourteenth Amendment embraces certain additional aspects of liberty not necessarily included in one of the specific provisions of the Bill of Rights. Such was the holding in *Rochin* vs. *California*, 342 U.S. 165 (1952). There police officers broke into defendant's bedroom where he was sitting partly dressed on his bed, upon which his wife was lying. They seized him and, by use of a stomach pump, extracted certain capsules which he had swallowed. This invasion of privacy was held, not a violation of the Fourth or Fifth Amendments, but a violation of due process in that it

---

[3] *Id.* at 217.

was inconsistent with the "respect for those personal immunities which . . . are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" 342 U.S. at 169.

It is true that the *Rochin* case involved intrusion upon privacy through physical violence. See *Irvine* vs. *California*, 347 U.S. 128 (1954). Yet the insistent development of the law has been to extend legal protection against harms to the person from physical to non-physical injuries. And there is no sound reason, especially under modern conditions of living, to withhold constitutional protection in those cases where the invasion of privacy, even though not achieved by physical means, is inconsistent with preserving the private sector of living against unwarranted infringement. As Mr. Justice Harlan said in *Poe* vs. *Ullman*, "It would surely be an extreme instance of sacrificing substance to form were it to be held that the Constitutional principle of privacy against arbitrary official intrusion comprehends only physical invasions by the police." 367 U.S. at 551. Indeed, in *Public Utilities Commission* vs *Pollak*, 343 U.S. 451 (1952), although it did not there uphold the claim, the Court recognized that the liberty guaranteed by the due process clause embraced invasion of privacy by non-violent means.[4]

It should be noted that the development of the right of privacy in constitutional law has been paralleled by the growth of the right of privacy in tort law. Such a right is now recognized

---

[4] The case in which a constitutional right of privacy has so far been most explicity recognized and sustained, is *York* vs. *Story*, 324 F.2d 450 (C.A. 9, 1963). In that case it was alleged that police officers took photographs of a woman complainant in the nude and distributed them among their fellow officers. The Court held that a cause of action was stated under 42 U.S.G.A. Sec. 1983 for depriving plaintiff of "rights . . . secured by the Constitution," specifically the right of privacy. See also Judge Washington, dissenting in *Silverman* vs. *U.S.*, 275 F.2d 173, 178 (C.A.D.C., 1960).

in most States, by judicial decision or legislation. As Harper and James have said: "Viewing this extraordinary development with the omniscience of hindsight, it appears that the inception of the doctrine was the almost inevitable development of the law under the pressure of great social need, produced by the technological developments and the vast extension of business which transformed American society into mass urbanization thus creating many new sensitivities." [5] The same needs which have led to the protection of privacy from non-governmental sources, even more urgently press for protection of that basic right from governmental invasion.

If, then, we accept the proposition that the Constitution affords protection to the right of privacy, the question becomes what standards are to be employed to delimit the area thus safeguarded. Such standards have not, of course, been fully worked out. Concededly the problem is a difficult one. Yet surely it is susceptible to resolution by normal judicial techniques, as the experience of the courts in the torts field attests. The issue must turn, as do other problems of interpreting the Bill of Rights, upon the fundamental ends sought by the constitutional guarantees, considered in the light of modern conditions and needs.

When we look at the legal development of the right of privacy, from earliest times to the present, two major elements stand out. What the law has most basically sought to protect, and what has in fact been brought within the concept, are (1) maintaining the sanctity of the home, and (2) preserving from outside intrusion the intimacies of the sexual relationship in marriage.

---

[5] 1 Harper and James, *The Law of Torts* (1956), p. 683. See also Prosser, *Privacy*, 48 Calif. L. Rev. 383 (1960).

The reasons are not far to seek. The home is the ultimate refuge, of every person high or low, from the outside world. It is the one chief tangible base, especially now that geographical escape to the frontier is foreclosed, for seeking seclusion. And, of all relations with other people, marital relations are the most private, the most sought to be sheltered from the public gaze. In these two realms "the right to be let alone" becomes most meaningful and most precious.

Hence it is not surprising that the Third Amendment expressly deals with the quartering of outsiders "in any house," and that the Fourth Amendment protects the "right of the people to be secure in their . . . houses." At common law, and presently under legislation, invasion of the home is afforded greater protection than invasion of the person; search of a house requires a warrant whereas an arrest can be made on reasonable grounds to believe a crime has been committed. See Barrett, *Personal Rights, Property Rights, and the Fourth Amendment*, 1960 Sup. Ct. Rev. 46. Decisions of this Court under the Fourth Amendment have recognized the special significance attached to invasion of the home. Compare *Goldman* vs. *United States*, 316 U.S. 129 (1942), with *Silverman* vs. *United States*, 365 U.S. 505 (1961). In *Rochin* the "illegally breaking into the privacy of petitioner" in his bedroom was a major factor in finding a violation of due process. 342 U.S. at 172. See also *Monroe* vs. *Pape*, 365 U.S. 167 (1961); and compare *Public Utilities Commission* vs. *Pollak*, 343 U.S. 451 (1952); *Lanza* vs. *New York*, 370 U.S. 139 (1962). And the development of the right of privacy in tort law began with protecting the seclusion of the plaintiff in his house or on his land. See 1 Harper and James, *The Law of Torts* (1956), pp. 678-9.

The personal aspects of the marital relationship have likewise been consistently recognized as entitled to protection under the right of privacy. This factor was also present in *Rochin*

vs. *California* and in *Monroe* vs. *Pape* (*supra*). Intrusion into this area, like invasion of the home, constituted the starting point in the growth of the right to privacy in tort law. See Harper and James, *supra*. Laws prohibiting the disclosure of the names of victims of sex crimes reflect the same concern. And at an earlier phase in the litigation over the statutes here at bar the Connecticut Supreme Court of Errors acknowledged the exceptional nature of this aspect of privacy by permitting the married couples involved to sue under fictitious names. *Buxton* vs. *Ullman*, 147 Conn. at 59-60, 156 A.2d at 514-5.

In reason, tradition and current practice, therefore, these two areas — the sanctity of the home and the wholly personal nature of marital relations — have been recognized as forming the inner core of the right of privacy. Whatever else that constitutional right may encompass, it surely includes protection for these aspects of the private sector of life.

The case now before the Court combines both of these critical elements in the right to privacy. The hand of the government reaches not only into the home but into the bedroom. The statutes are directed not at regulation of sale, prescription or advertising, but at *use*. Enforcement of the statute would entail search warrants to discover "instruments" of crime in the bathroom closet. Testimony of close friends or servants in the home would be required.

It is hardly necessary to detail these aspects of the case in this brief. Both Justices who reached the merits in *Poe* vs. *Ullman* were struck by the shocking invasion of privacy inherent in the Connecticut statutes, and said all that needs to be said on this score. Mr. Justice Douglas observed:

> "The regulation as applied in this case touches the relationship between man and wife. It reaches into the intimacies of the marriage relationship. If we imagine a

regime of full enforcement of the law in the manner of an Anthony Comstock, we would reach the point where search warrants issued and officers appeared in bedrooms to find out what went on. It is said that this is not the case. And so it is not. But when the State makes 'use' a crime and applies the criminal sanction to man and wife, the State has entered the innermost sanctum of the home. If it can make this law, it can enforce it. And proof of its violation necessarily involves an inquiry into the relations between man and wife.

"That is an invasion of the privacy that is implicit in a free society." 367 U.S. at 519-21.

And Mr. Justice Harlan summed it up in the following terms:

"Precisely what is involved here is this: the State is asserting the right to enforce its moral judgment by intruding upon the most intimate details of the marital relation with the full power of the criminal law. Potentially, this could allow the deployment of all the incidental machinery of the criminal law, arrests, searches and seizures; inevitably, it must mean at the very least the lodging of criminal charges, a public trial, and testimony as to the *corpus delicti*. Nor could any imaginable elaboration of presumptions, testimonial privileges, or other safeguards, alleviate the necessity for testimony as to the mode and manner of the married couples' sexual relations, or at least the opportunity for the accused to make denial of the charges. In sum, the statute allows the State to enquire into, prove and punish married people for the private use of their marital intimacy." 367 U.S. at 548.

It is no answer to say that the statutes have not been enforced in this way. The vice is that they can be. As long as the statutes are on the books the fundamental rights of privacy of married couples in Connecticut are threatened.

Nor is it an answer to say that other statutes, dealing with fornication, adultery, homosexuality and the like, raise the same issues of privacy. We are not concerned with those statutes here. In any event Mr. Justice Harlan disposed of the argument in *Poe* vs. *Ullman* when he said:

> "Adultery, homosexuality and the like are sexual intimacies which the State forbids altogether, but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power either to forbid extramarital sexuality altogether, or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy." 367 U.S. at 553.

We need only add that, as discussed in Point II, no compelling reasons of State policy justify the invasion of the constitutional right of privacy brought about by these statutes. Indeed, our analysis of the objectives sought by the legislation reveals that no material benefits whatever, but only positive harms, flow from this legislation. We submit that it would be hard to find a more far-reaching invasion of the private sector of life than this case discloses.

POINT IV.

The Connecticut Statutes, On Their Face And As Applied In This Case, Violate The First And Fourteenth Amendments In That They Abridge Freedom Of Speech.

A.

Section 54-196 applies to any person "who assists, abets, *counsels*, causes, hires or commands another to commit any offense." As the statute is worded, and as the Connecticut Supreme Court of Errors has interpreted it, the mere "counselling" is sufficient to establish the offense. Thus in the leading case of *State* vs. *Scott*, 80 Conn. 317, 68 A. 258 (1907), the Court, in defining the rule for criminal liability of an accessory, stated:

> "Every one is a party to an offense who . . . does some act which forms part of the offense, or assists in the actual commission of the offense or of any act which forms a part thereof, or *directly or indirectly counsels* or procures any person to commit the offense or do any act forming a part thereof." 80 Conn. at 323, 68 A. at 260. (Italics added).

The Supreme Court of Errors reiterated this position in a subsequent key decision on the statute, saying that the offense was established if "the defendant procured, *counseled or encouraged* [another] to do it," " . . . that she knowingly abetted, *counseled or encouraged* [the other] in his guilty purpose." *State* vs. *Wakefield*, 88 Conn. 164, 167, 173, 90 A. 230, 231, 233 (1914). (Italics added).

Consequently Section 54-196, combined with Section 53-32 (the use statute), would apply to a mother who advises her newly married daughter to use contraceptives in order to avoid pregnancy during a period of ill-health. It would apply to a physician who, without making the materials available or taking other action, advises a patient on the harmless or deleter-

ious qualities of a new contraceptive pill. It might apply to a faculty member of a medical school who instructs his students on the medical techniques of contraception. It might also make it a crime for an organization concerned with planned parenthood to publish a pamphlet urging the use of contraceptives for family planning. It would apply to a minister of the Congregational Church in Connecticut who counsels his parishioners that proper family planning is a religious obligation and that contraceptive devices are the best and most effective means of fulfilling this duty. [1]

These applications of the statute violate the First Amendment's guarantee against abridgement of freedom of speech. Such cases are clearly governed by the doctrine laid down by this Court in *Kingsley Pictures Corp.* vs. *Regents*, 360 U.S. 684 (1959). In that case the Court held unconstitutional under the First Amendment New York's ban on the film "Lady Chatterley's Lover." The State had argued that it could constitutionally forbid the advocacy of conduct — in this case, adultery — which it could validly make a crime. The Court, speaking through Mr. Justice Stewart, said:

> "Its [the First Amendment's] guarantee is not confined to the expression of ideas that are conventional or shared by the majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax." 360 U.S. at 689. [2]

---

[1] See the resolution of the Connecticut Conference of Congregational Churches approving the "proper use of medically approved contraceptives that may contribute to the spiritual, emotional and economic welfare of the family," quoted in Point II, Section F, subsection 4, *supra*.

[2] Furthermore, in so far as the statutes operate to prevent the obtaining of medical advice, the case is similar to *N.A.A.C.P.* vs. *Button*, 371 U.S. 415 (1963), and *Brotherhood of R.R. Trainmen* vs. *Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964).

It is no answer to say that the Connecticut courts would not attempt to apply the statutes to counseling of this nature. We do not know. Such an application of the statutes would be no more extreme than that sanctioned in *Tileston* vs. *Ullman*, 129 Conn. 84, 26 A.2d 582, or *Buxton* vs. *Ullman*, 147 Conn. 48, 156 A.2d 508.

In any event, the very breadth and ambiguity of statutory prohibition against "counseling" operate to abridge freedom of speech. Persons apparently or possibly covered by its broad scope could not be certain what was prohibited and what was permitted. This kind of inhibiting effect upon the right to freedom of expression must fall under the repeated decisions of this Court in cases such as *Winters* vs. *New York*, 333 U.S. 507 (1948); *Burstyn* vs. *Wilson*, 343 U.S. 495 (1952); *Louisiana ex rel. Gremillion* vs. *N.A.A.C.P.*, 366 U.S. 293 (1961); *Cramp* vs. *Board of Public Instruction*, 368 U.S. 278 (1961); *N.A.A.C.P.* vs. *Alabama ex rel. Flowers*, 377 U.S. 288 (1964); *Baggett* vs. *Bullitt*, 377 U.S. 360 (1964).

We conclude, therefore, that the statute is invalid on its face.

B.

The application of the statutes to appellants in this case likewise abridged their rights to freedom of speech. In reaching its judgment that appellants were guilty of violating Sections 53-32 and 54-196 the trial court at many points relied upon conduct which was strictly speech and protected by the First Amendment. We do not contend that such conduct as examining patients, prescribing contraceptive devices, or furnishing patients with contraceptive materials constituted expression within the terms of the First Amendment. But other conduct, used as a basis for the finding of guilt, was exclusively speech.

The trial court included in its findings of fact, and hence as relevant to conviction, the following items of protected speech:

(1) The Center was opened "*to provide information, instruction and medical advice* to married persons as to the means of preventing conception and to *educate married persons* generally as to such means and methods." (R. 17).

(2) "The Center made such *information, instruction, education and medical advice available to married persons* . . ." (R. 17).

(3) Defendant Buxton gave "contraceptive *advice* to patients at the Center . . ." (R. 18).

(4) ". . . the patient attended a *group orientation session* with other patients at which all the methods of contraception available at the Center were described. . ." (R. 19).

(5) ". . . there were periods of time during which the patient . . . sat in the waiting room where there were *various pieces of literature*, including certain exhibits in evidence . . . available to her and which were *examined and read* by some of the patients of the Center." (R. 19).

(6) Defendant Griswold on several occasions "conducted the *group orientation session* . . ." (R. 20).

The trial court also included in its conclusions of law the following items:

(1) The three married women who testified concerning the use of contraceptives "sought and obtained instruction and *medical advice and counsel* as to methods of contraception . . ." at the Center. (R. 23).

(2) "The actions of the defendants in supervising and participating in the operation of this Center . . . constituted assisting, abetting, *counselling*, causing and commanding these women to commit a violation of the Statute . . ." (R. 23).

(3) "The actions of the defendant Estelle T. Griswold . . . *in delivering orientation lectures* describing the various methods of contraception available at the Center . . . constituted as-

sisting, abetting, *counselling*, causing and commanding two married women . . . to use drugs, medicinal articles and instruments for the purpose of preventing conception, in violation of said Sections 53-32 and 54-196 . . ." (R. 24).

(4) "The actions of the defendant C. Lee Buxton, a doctor, in giving . . . a married woman, a pelvic examination and in *approving* her choice of the orthogynol jelly . . . constituted assisting, abetting, *counselling*, causing and commanding [said woman] to use a drug or medicinal article for the purpose of preventing conception, in violation of said Sections 53-32 and 54-196 . . ." (R. 24).

The findings and conclusions are thus a grab bag of protected speech, and action not protected by the First Amendment. This failure to separate speech from action, and to make certain that only action formed the basis of the conviction, constitutes a violation of the First Amendment. The issue is controlled by the doctrine first clearly enunciated in *De Jonge* vs. *Oregon*, 299 U.S. 353 (1937). In that case the Court was asked to uphold the conviction of a member of the Communist Party who had presided at a meeting devoted to protests against police brutality in a labor dispute. The Court proceeded upon the assumption that the Communist Party had elsewhere engaged in illegal acts in violation of the State law. But Chief Justice Hughes ruled that the State power extended only to punishment of specific evils and could not prevent the associational expression of holding a peaceful meeting. He stated the principle in the following terms:

> "These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed." 299 U.S. at 364-5.

A similar admixture of speech and action also resulted in the invalidation of the conviction in *Thomas* vs. *Collins*, 323 U.S. 516 (1945). The Court has applied the same rule in other First Amendment cases, most particularly in *Gibson* vs. *Florida Legislative Investigation Commission*, 372 U.S. 539 (1963), and *N.A.A.C.P.* vs. *Alabama ex rel. Flowers*, 377 U.S. 288 (1964).

It is vital to any effective protection of freedom of speech that the courts insist upon maintaining this fundamental distinction between speech and action, and not permit the government to encroach upon the area of speech under the guise of controlling action. The Connecticut courts have not adhered to this principle in the case at bar.

Viewed realistically, the application of the anti-contraceptive statutes to these appellants is primarily an effort by the State of Connecticut to prevent information on birth control from reaching the public. As this Court found in *Poe* vs. *Ullman*, Connecticut has not in practice enforced the statutes against individual users or against physicians prescribing contraceptives to private patients. But it does enforce them against an association seeking to make the same information available to the general public. In a very real sense, the action of the State contravenes the basic purposes of the First Amendment. As this Court said in *Thornhill* vs. *Alabama*:

> "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." 310 U.S. 88, 101-2 (1940).

For these reasons, we submit, the statutes are void on their face and as applied to these appellants, being squarely in conflict with the letter and spirit of the First Amendment.

CONCLUSION

Appellants contend that these Connecticut statutes, on their face and as applied, violate the due process clause of the Fourteenth Amendment in that they are not reasonably related to a legitimate legislative purpose, and are otherwise unreasonable, arbitrary and capricious; that they violate the same provision in that they constitute an unjustified invasion of privacy; and that they violate the First Amendment as incorporated in the Fourteenth Amendment. Appellants respectfully urge this Court to reverse the decision below.

THOMAS I. EMERSON,
127 Wall Street,
New Haven, Conn.

CATHERINE G. RORABACK,
185 Church Street,
New Haven, Conn.
Attorneys for Appellants.